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In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

STANLEY APFELBAUM

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 584 F.2d 1264.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on August 10, 1978. A timely

petition for rehearing was denied on October 16, 1978 (App. C, *infra*). On November 6, 1978, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including December 15, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in prosecuting a grand jury witness for testifying falsely under a grant of immunity, the government may introduce at trial relevant portions of the witness's immunized testimony other than the statements charged as the *corpus delicti* of the false statements offense.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides, in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

Section 201(a) of the Organized Crime Control Act of 1970, 18 U.S.C. 6002, provides:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> (1) a court or grand jury of the United States,
>
> (2) an agency of the United States, or

> (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,
>
> and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, respondent was convicted on two counts of making false declarations before a federal grand jury, in violation of 18 U.S.C. 1623(a). He was sentenced to terms of two years' imprisonment on each count, to be served concurrently.

1. Respondent, a former administrative assistant to the Philadelphia District Attorney, was called before a grand jury in the Eastern District of Pennsylvania. The grand jury was investigating allegations of criminal activities by the president and the general manager of a Philadelphia automobile dealership, with whom respondent was associated. Relying on his privilege against compelled self-incrimination, respondent refused to testify. He was then granted

immunity under 18 U.S.C. 6002 and was recalled before the grand jury. On December 13, 1976, and January 3, 1977, he testified pursuant to the immunity order (App. A, *infra*, 2a-3a; Tr. 3-8).

Respondent was asked a number of questions about his relationship with Harry Brown, the general manager of the automobile dealership. In response to detailed questioning, respondent denied that he had tried to locate Brown in Florida in 1975; he also denied that he had told FBI agents he had lent $10,000 to Brown. The grand jury subsequently indicted respondent, charging that these two statements were false and that they were material to the grand jury's investigation (App. A, *infra*, 3a).[1]

The indictment contained excerpts from the grand jury proceedings in which respondent made the alleged false statements. The first count of the indictment recited the portion of respondent's December 13, 1976, grand jury testimony in which he denied that he had tried to locate Brown in Florida in December 1975 (App. A, *infra*, 3a-5a). The second count recited the portions of his December 13, 1976, and January 3, 1977, testimony in which he denied that he had told agents of the FBI that he had lent $10,000 to Brown (App. A, *infra*, 5a-7a).

[1] The district court found that the statements were material (Tr. 440) on the basis of the government's proof, outside the presence of the jury, regarding the nature of the grand jury's investigation. That proof showed that the grand jury had been investigating an allegedly staged robbery at the automobile dealership and was seeking to determine whether Apfelbaum was an aider and abettor or an accessory after the fact to the staged robbery (Tr. 4-8). In the course of that inquiry, the grand jury sought to learn the details of Apfelbaum's financial dealings with Brown (Tr. 9-20). Brown was subsequently convicted on charges of mail fraud, racketeering, collecting extensions of credit by extortionate means, and conspiracy (App. A, *infra*, 3a n.2).

The evidence at trial showed that in February 1975 respondent and Brown had applied for a $10,000 bank loan, purportedly on behalf of respondent's superior, Philadelphia District Attorney F. Emmett Fitzpatrick (Tr. 200-204, 298). The loan was approved, and on March 3, 1975, $10,000 was credited to a checking account in Fitzpatrick's name (Tr. 215, 221-224). In the following week, checks for $9500 and $475 were drawn on the account and cashed by Brown (Tr. 226-229, 231-235).

In December 1975, respondent told two bank officials that he would be traveling to Florida and that he intended to contact Brown while he was there (Tr. 241, 299). A few days later, respondent visited a school in Florida where Brown's daughter was enrolled and asked for Brown's address (Tr. 137-138, 146, 149). Later in the month, respondent tried to obtain Brown's address from a bank in Florida (Tr. 165-170). He subsequently told two FBI agents that he had tried to locate Brown on that occasion because, through an "extremely complicated arrangement," he had lent $10,000 to Brown and wanted to recover the money (Tr. 303-315, 328-331).

In addition to the false statements alleged in the indictment, the government offered in evidence other portions of respondent's testimony in order to put

the charged statements in context and to show that respondent knew they were false (App. A, *infra*, 8a and n.5).[2] These excerpts concerned respondent's relationship to Brown, his 1976 trip to Florida to visit Brown, the discussions he had with Brown on that occasion, and his denial that he had had financial dealings with the automobile dealership in Philadelphia or had co-signed a loan for Brown (Tr. 96-97, 105-114, 120-125). Over objection (Tr. 39-40), the district court admitted these portions of respondent's immunized testimony on the ground that they were relevant to prove that respondent had knowingly made the charged false statements (App. A, *infra*, 8a-9a; Tr. 45, 48, 49).[3]

2. The court of appeals reversed. It held that the government could introduce only those portions of respondent's immunized testimony that were charged as the *corpus delicti* of the false statement offenses (App. A, *infra*, 11a-12a). Immunized statements

[2] In order to minimize the risk of unfair prejudice, references to the racketeering and extortion offenses that the grand jury was investigating were omitted from the parts of the grand jury proceedings that were read to the jury (see Tr. 48-49).

[3] As the court of appeals noted (App. A, *infra*, 9a n.7), respondent objected to the admission of only certain portions of the grand jury testimony; he affirmatively sought to have other portions admitted (Tr. 39-40). The government did not argue in the court of appeals and we do not argue here that respondent's acquiescence in the admission of certain parts of the grand jury testimony constitutes a waiver of respondent's privilege against compulsory self-incrimination with respect to the rest of the testimony.

that "did not form the core of, and * * * were not incorporated in, the indictment" could not be introduced (*id.* at 16a). Although recognizing that a grant of immunity does not protect a witness from prosecution for perjury or false declarations, the court held that to use immunized testimony for evidentiary purposes, even in a perjury or false declarations prosecution, would violate the prohibition against governmental use of immunized testimony. Accordingly, the court held that the government may introduce "only the statement or statements of the defendant which the grand jury has charged to be perjurious, together with no more than that minimal testimony *essential* to place the charged falsehood into its proper context" (*id.* at 14a & n.9).[4]

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals in this case, if allowed to stand, will substantially impair the government's ability to prosecute witnesses for perjury committed under a grant of immunity. To establish a perjury or false statements offense, the government must prove not only that the defendant made material false statements under oath but also that he believed

[4] In reaching this result, the court relied heavily on two of its prior decisions, *United States* v. *Frumento*, 552 F.2d 534, 541-543 (3d Cir. 1977) (en banc), and *United States* v. *Hockenberry*, 474 F.2d 247, 249-250 (3d Cir. 1973). In those cases, the court stated the principle, applied here, that immunized testimony could be used only as the *corpus delicti* of a subsequent perjury or false statements prosecution.

his testimony was false. Both elements—and particularly the latter—are difficult to prove in many cases. See, *e.g.*, *United States* v. *Sweig*, 441 F.2d 114, 117-118 (2d Cir.), cert. denied, 403 U.S. 932 (1971).

Often the best evidence that a defendant knowingly made a false statement is provided by the context in which the statement was made. For example, if a witness is evasive in answering certain questions, the jury may properly infer that his false testimony on those points is conscious rather than unwitting or inadvertent. See *United States* v. *Kopel*, 552 F.2d 1265, 1269-1270 (7th Cir.), cert. denied, 434 U.S. 970 (1977); *Gebhard* v. *United States*, 422 F.2d 281, 289 (9th Cir. 1970). Similarly, a witness's responses to other questions may cast doubt on the truth of the statements at issue or undercut the witness's claim that he did not realize his testimony was false. See *United States* v. *Demopoulos*, 506 F.2d 1171, 1177 (7th Cir. 1974), cert. denied, 420 U.S. 991 (1975); *Gebhard* v. *United States*, *supra*, 422 F.2d at 289; *Harrell* v. *United States*, 220 F.2d 516, 520 (5th Cir. 1955).

This case illustrates these points well. Respondent's admission that he located Brown in Florida when he was there in early 1976 (Tr. 59-60, 66, 101-112) casts doubt on the truth of his testimony that he had not tried to locate Brown when he was in Florida in December 1975. His evasiveness in testifying about how he learned where Brown could be found (Tr. 84, 87, 105, 120-125) further supports the inference that he was testifying untruthfully when he said that he

had not made any effort to contact Brown on his December 1975 trip. And his general evasiveness about his relationship with Brown and about his interview with the FBI agents in 1976 (Tr. 63-65, 75, 96-99, 106-116, 125-126) supports the allegation that he was dissembling when he denied telling the FBI that he had lent $10,000 to Brown.

Because other portions of a witness's immunized testimony often provide the most important evidence of his perjury, and because neither the Constitution nor the federal immunity statute, 18 U.S.C. 6002, prohibit the introduction of immunized testimony in a perjury or false statements prosecution, the decision of the court of appeals imposes a substantial and unsound restriction on the government's ability to protect the grand jury system against the abuse of perjury.

The Court has recently heard argument in a case dealing with constitutional limitations on the uses of immunized testimony, *New Jersey* v. *Portash*, No. 77-1489, argued December 5, 1978, and it has granted certiorari in another case presenting a different facet of the problem, *Dunn* v. *United States*, No. 77-6949. The instant case presents yet another aspect of this important issue, and it should be reviewed by this Court, perhaps in tandem with *Dunn*.

1. The holding of the court of appeals that the Fifth Amendment prohibits the use of immunized testimony in a perjury prosecution except as the *corpus delicti* of the offense is contrary to this Court's deci-

sions analyzing the relationship between perjury and the privilege against compulsory self-incrimination.

In *Glickstein* v. *United States*, 222 U.S. 139 (1911), the Court held that immunized testimony could constitutionally be used in a prosecution for perjury committed under a grant of immunity. The Court recited the well-settled rule that a witness could be compelled to testify if he were granted immunity "commensurate with the protection guaranteed by the [Fifth Amendment]." 222 U.S. at 141. The power to compel a witness to testify, the Court noted, is the power to compel him to testify truthfully. *Id.* at 142. Because immunity "relates to the past and does not endow the person who testifies with a license to commit perjury," the Court held that the Fifth Amendment permits the government to prosecute the immunized witness for perjury and to use his immunized testimony to prove that offense. *Ibid.*

Although the Court in *Glickstein* sanctioned the prosecution of a witness for perjury committed while giving immunized testimony, it did not address the question of what use could be made of the immunized testimony introduced in the perjury prosecution. That question was presented in the subsequent case of *Cameron* v. *United States*, 231 U.S. 710 (1914). In *Cameron* the defendant was indicted for committing perjury in two separate proceedings: in a hearing before a bankruptcy commissioner, and in a subsequent proceeding before the bankruptcy referee. At trial, the government introduced the defendant's testimony in the proceeding before the commissioner to prove

that he perjured himself in the proceeding before the referee. The Court held that under the applicable immunity statute, Rev. Stat. Section 860, 15 Stat. 37, the testimony given in the proceeding before the commissioner should not have been received to establish perjury in the proceeding before the referee. 231 U.S. at 724. The Court, however, rejected the defendant's alternative argument that in proving perjury in a single proceeding the government may introduce only the portion of a witness's testimony that is specifically charged as perjurious. The immunity granted by the statute, the Court noted,

> was not intended to put a premium upon perjury by giving protection against the use of the testimony in prosecutions for that crime; and we cannot agree with petitioner's contention that the use of such testimony is limited to proving that it was in fact given. In prosecutions for perjury the statute saved the right to use such testimony for any legitimate purpose in establishing the charge made. * * *

231 U.S. at 720-721.[5]

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[5] The Court's holding that testimony in one proceeding could not be used to prove perjury in the other was based on a construction of the immunity statute and not, apparently, on the Fifth Amendment. See 231 U.S. at 720, 724. The Court's ruling that testimony in a single proceeding could be used "for any legitimate purpose" in proving perjury was also based on a construction of the statute, but because the Court would not have construed the statute in a fashion that would

The ruling in *Cameron* that immunized testimony can be used "for any legitimate purpose" in establishing perjury under a grant of immunity, and not only as the *corpus delicti* of the perjury charge, is consistent with subsequent decisions in which this Court has held that the privilege against compulsory self-incrimination does not protect a witness against prosecution for perjury. See, *e.g.*, *United States* v. *Wong*, 431 U.S. 174, 178 (1977); *United States* v. *Washington*, 431 U.S. 181, 189 (1977); *United States* v. *Mandujano*, 425 U.S. 564, 576-578 (plurality opinion); *id.* at 584-585 (Brennan, J., concurring in judgment); *id.* at 609 (Stewart, J., concurring in judgment);[6] *United States* v. *Knox*, 396 U.S. 77 (1969). Because perjury undermines the entire purpose for which immunity is granted, an immunized witness indicted for false swearing is not entitled to the benefits of the immunity he is charged with abusing. Cf. *Clark* v. *United States*, 289 U.S. 1, 14 (1933).

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render it unconstitutional, *Cameron* necessarily implies that the Constitution permits at least as great a use of immunized testimony as was permitted by the statute there at issue.

[6] In *Mandujano*, although the Court was not faced with the problem of how much of the defendant's grand jury testimony could be introduced against him in a prosecution for perjury, the plurality opinion noted that "[e]ffective restraints against this type of egregious offense [perjury under grant of immunity] are * * * imperative," 425 U.S. at 576, and Mr. Justice Stewart pointed out that the defendant's grand jury testimony was admissible because it was "relevant only to his prosecution for perjury and was not introduced in the prosecution for [the offense that the grand jury was investigating]." 425 U.S. at 609.

Relevant immunized testimony should be admissible in a prosecution for perjury not only because of the particular need to protect against false swearing, but also because perjury is an offense that is committed in the course of the witness's testimony and therefore stands in a very different position for constitutional purposes from the offense about which the defendant is being questioned. The immunized testimony may be introduced to prove a contemporaneous perjury because at the time the defendant asserted his privilege against compulsory self-incrimination and was granted immunity from the use or derivative use of his testimony, he had not yet committed the perjury for which he is being prosecuted.

Ordinarily, a person cannot claim the privilege with respect to offenses he may commit in the future. See *United States* v. *Freed*, 401 U.S. 601, 607 (1971); *id.* at 611 (Brennan, J., concurring in judgment); *United States* v. *Bryan*, 339 U.S. 323, 340 (1950); *Glickstein* v. *United States*, *supra*, 222 U.S. at 142; *United States* v. *Tramunti*, 500 F.2d 1334, 1344 (2d Cir. 1974).[7] Therefore, at the time the witness

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[7] In *Marchetti* v. *United States*, 390 U.S. 39, 53-54 (1968), the Court rejected an absolute past-future distinction for purposes of evaluating the scope of the privilege that may legitimately be claimed under the Fifth Amendment. But *Marchetti* noted that "prospective acts will doubtless ordinarily involve only speculative and insubstantial risks of incrimination" (*id.* at 54). Thus, particularly in light of the Court's subsequent decision in *Freed*, we do not believe that *Marchetti* can be read as holding that any possibility of incrimination with respect to future offenses will support the invocation of the privilege. At most, it suggests that the

claimed his Fifth Amendment privilege, he could not have based his claim on the prospect that in testifying before the grand jury he might decide to lie and thereby expose himself to a charge of perjury.

It is, of course, well settled that the scope of the immunity granted to a witness must be coextensive with the scope of the privilege that it displaces. See *Kastigar* v. *United States*, 406 U.S. 441, 449 (1972); *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 54, 78 (1964); *Counselman* v. *Hitchcock*, 142 U.S. 547, 585 (1892). Yet because a witness could not claim the privilege with respect to a prospective act of false swearing before the grand jury, there is no constitutional requirement that the immunity granted in place of the privilege protect against the use of the witness's testimony in prosecutions for that offense. Accordingly, the Constitution does not require that relevant testimony given under a grant of immunity be excluded in a prosecution for perjury committed under that immunity grant.[8]

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general principle of distinguishing between past and future offenses may be subject to a fairly narrow exception in cases in which the potential for incrimination is substantial, non-speculative, and relatively immediate.

[8] The same principle would apply to any other offense committed by the witness in the course of his grand jury appearance. For example, if the witness were being questioned under a grant of immunity and he attempted to bribe the grand jurors, he could be prosecuted for bribery, and the Constitution would not prohibit the government from introducing other portions of his grand jury testimony to show that his offer was serious.

2. This constitutional analysis is entirely consistent with the witness immunity statute, 18 U.S.C. 6002, at least as it applies to the offenses of perjury and false swearing. The immunity statute states that if a witness, claiming the privilege against compulsory self-incrimination, is compelled to testify under a grant of immunity, his testimony cannot be used against him except in "a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order [to testify]."

The statute contains no limitation restricting the use of relevant immunized testimony in a prosecution for perjury or giving a false statement. Instead, the plain terms of the statute contemplate that the statutory prohibition against using immunized testimony simply does not apply to prosecutions for perjury or false swearing in the immunized proceeding. Nor does the legislative history of the statute suggest that it should be read to limit the use of immunized testimony to the *corpus delicti* of the false swearing charge. The statute was enacted as part of Title II of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 927, and it was designed to replace the various transactional immunity statutes then in existence with a single use and derivative use immunity provision. The predecessor statutes contained no restrictions on the use of immunized testimony in perjury prosecutions,[9] and

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[9] See, *e.g.*, 18 U.S.C. (1970 ed.) 2514; 7 U.S.C. (Supp. V 1964 ed.) 87f(f); 18 U.S.C. (Supp. V 1964 ed.) 895; 42

the committee reports on the new statute contain no suggestion that any such restriction was intended. See S. Rep. No. 91-617, 91st Cong., 1st Sess. 51-56, 107-108, 144-146 (1969); H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 32-33, 42-43 (1970).[10] On the contrary, the comments on Title IV of the Act, which contained the new false declaration statute, 18 U.S.C. 1623, indicate that Congress meant to ease the proof problems in prosecutions for false swearing.[11]

3. The courts of appeals that have ruled on the issue presented here have reached different results on the basis of widely differing modes of analysis. The Second and Tenth Circuits have held that immunized testimony may be used for any purpose if

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U.S.C. (1964 ed.) 405(f). The complete list of affected immunity provisions is found in Sections 202 through 260 of the 1970 Act, 84 Stat. 928-932.

[10] The reports reflect that the "statutory immunity is intended to be as broad as, but no broader than, the privilege against self-incrimination." S. Rep. No. 91-617, *supra*, at 145. The comment on the perjury exception was simply that the "exception for perjury, false statements or other failure to comply with the order is probably unnecessary." *Ibid.* The Senate Committee thus recognized that a "perjury exception" would be read into the statute even if were not expressly included. See *Glickstein* v. *United States*, *supra*.

[11] The Senate Committee expressed concern that the "possibility of perjury prosecution [under the perjury statutes then in force] is not likely, and if it materializes, the likelihood of a conviction is not high." S. Rep. No. 91-617, *supra*, at 57. Congress therefore eliminated the two-witness rule and the direct evidence rule in prosecutions for making false statements before grand juries and courts. *Id.* at 57-59, 109-111, 149-150.

it is false, but that truthful immunized testimony may not be used at all, even in a prosecution for perjury. See *United States* v. *Dunn*, 577 F.2d 119, 125-126 (10th Cir. 1978), cert. granted, No. 77-6949 (December 11, 1978); *United States* v. *Berardelli*, 565 F.2d 24, 28 (2d Cir. 1977); *United States* v. *Moss*, 562 F.2d 155, 165 (2d Cir. 1977), cert. denied, 435 U.S. 914 (1978); *United States* v. *Housand*, 550 F.2d 818, 822 (2d Cir. 1977); *United States* v. *Kurzer*, 534 F.2d 511, 518 (2d Cir. 1976). This result is premised on the view that untruthful immunized testimony does not enjoy constitutional protection. See *United States* v. *Tramunti*, *supra*, 500 F.2d at 1343-1344; cf. *United States* v. *Kahan*, 415 U.S. 239 (1974).[12]

The Seventh Circuit has agreed with the Third Circuit that immunized testimony may be used only to the extent necessary to establish the *corpus delicti* of the charged perjury "together with no more than that minimal testimony *essential* to place the charged falsehood into its proper context" (App. A, *infra*, 14a

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[12] The Second and Tenth Circuits have both taken the position that the untruthfulness of the statements in question can be established by the witness's admission, even if there are grounds for doubting the truth of the admission. *United States* v. *Dunn*, *supra*, 577 F.2d at 125; *United States* v. *Moss*, *supra*, 562 F.2d at 165. The Second Circuit permits the use of testimony that is charged to be false in a perjury prosecution on the ground that the jury by its verdict makes the requisite finding that the testimony is false, see *United States* v. *Anzalone*, 555 F.2d 317, 320 (2d Cir. 1977); *United States* v. *Moss*, *supra*, 562 F.2d at 165, even though the testimony is "used" prior to the time it is found to be false.

n.9). *United States* v. *Frumento, supra,* 552 F.2d at 541-543; *United States* v. *Patrick,* 542 F.2d 381, 385 (7th Cir. 1976), cert. denied, 430 U.S. 931 (1977); *United States* v. *Hockenberry, supra,* 474 F.2d at 249-250.

Finally, the Sixth and Eighth Circuits have held, in accordance with our analysis here, that an immunity order confers no protection in a prosecution for perjury committed in the course of the immunized testimony, although the pertinent cases from those circuits are quite old. *Daniels* v. *United States,* 196 F. 459, 462-463 (6th Cir. 1912); *Edelstein* v. *United States,* 149 F. 636, 642-644 (8th Cir. 1906).

In light of the disparate approaches taken by the courts of appeals in addressing this important question, and particularly in light of the recent trend—of which this case is one example—towards restricting the use of immunized testimony in proving perjury, review by this Court is warranted.

4. This Court has recently granted certiorari in *Dunn* v. *United States, supra,* which presents an issue closely related to that presented by the instant case. In *Dunn,* the defendant had given immunized testimony before the grand jury. He subsequently gave inconsistent, non-immunized testimony on the same subject at a judicial hearing and was indicted under 18 U.S.C. 1623 for making false statements. The prosecution was premised on the inconsistent statements method of proof authorized by Section 1623(c). The principal issue before the Court in *Dunn* is whether the conviction can be sustained when

it may have been based upon the use of truthful testimony given to the grand jury under a grant of immunity to prove the falsity of subsequent non-immunized testimony.

While the *Dunn* case presents a somewhat different issue from the instant case, both are concerned with aspects of the important question of the nature of the immunity conferred when a witness is compelled to testify over a claim of the privilege against compulsory self-incrimination. Since the decision in *Dunn* will not necessarily control the disposition of this case, the Court may deem it advantageous to consider the instant case in tandem with *Dunn.*[13]

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[13] The disposition of this case could also be affected by the decision in *New Jersey* v. *Portash,* No. 77-1489, argued December 5, 1978. We suggested in our memorandum in *Dunn* that the Court might wish to defer disposition of the petition in that case until *Portash* had been decided. Since the Court has elected not to do so, we see no reason why the disposition of the petition here should be deferred for the decision in *Portash.* While the Court might wish to defer it pending the disposition of *Dunn,* we believe it might prove more advantageous to give plenary consideration to the instant case together with *Dunn.*

We recognize that the instant petition might not be ripe for the Court's consideration before February 1979, and that a decision to consider it in tandem with *Dunn* might make it difficult to dispose of the latter case this Term. Should the Court deem it appropriate, however, we would agree to an expedited briefing schedule in the instant case in order to make April argument possible.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1978

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 77-2427

UNITED STATES OF AMERICA

v.

APFELBAUM, STANLEY, APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Crim No. 77-317)

Argued: June 6, 1978

(Opinion filed August 10, 1978)

Before: ADAMS, WEIS and GARTH, *Circuit Judges*

OPINION OF THE COURT

GARTH, *Circuit Judge*

This appeal calls upon us to examine the contours of the permissible use by the Government of immu-

nized grand jury testimony where that testimony does not constitute the *corpus delicti* or core of a defendant's false swearing indictment. In resolving this issue, we recognize the tension created by the conflicting interests between the power of a grand jury to compel testimony and a witness's privilege against self-incrimination. Following the teaching of *Kastigar* v. *United States*, 406 U.S. 441 (1972), and the precepts established in this court's precedents, *see United States* v. *Frumento*, 552 F.2d 534, 542-43 (3d Cir. 1977) (en banc); *United States* v. *Hockenberry*, 474 F.2d 247 (3d Cir. 1973), we hold that grand jury testimony which is compelled under a grant of immunity may be utilized only as the *corpus delicti* of an indictment for perjury or for false swearing. *See* 18 U.S.C. § 6002.

I

On December 13, 1976 and January 3, 1977, Stanley Apfelbaum, then an administrative assistant to the District Attorney in Philadelphia, appeared as an immunized witness before a federal grand jury.[1] The grand jury was investigating criminal activities (including racketeering and extortion) alleged to be involved in the operation of a Chestnut Hill automobile dealership in Philadelphia.

In response to questioning before the grand jury, Apfelbaum made two series of statements which

[1] Immunity had been granted in accordance with 18 U.S.C. § 6002, *quoted in full in* n.8 *infra*.

served as the basis for his subsequent false swearing indictment and conviction. In his December 13th grand jury testimony *he denied that he had tried to locate one Harry Brown in Fort Lauderdale, Florida during the month of December, 1975.*[2] Then, on December 13, 1976 and again on January 3, 1977, Apfelbaum testified before the grand jury that *he did not recall telling F.B.I. agents that he had loaned $10,000 to Brown.* The grand jury which heard these two statements returned an indictment against Apfelbaum which charged him with two counts of wilfully and knowingly making false material declarations before a grand jury in violation of 18 U.S.C. § 1623.[3]

With respect to Apfelbaum's "locating Brown," paragraph 5 of Count One of the indictment recited Apfelbaum's grand jury testimony. That testimony and the charging clause of the indictment follow:

> Q. It's my understanding you went down to Florida in December of 1975, approximately the 5th of December.
>
> A. That's right. That's what I said before.

[2] Harry Brown was the general manager of Chestnut Hill who was subsequently convicted of collecting extensions of credit by extortionate means (in violation of 18 U.S.C. § 894); mail fraud (18 U.S.C. § 1341); racketeering (18 U.S.C. § 1962); and conspiracy (18 U.S.C. § 371).

[3] 18 U.S.C. § 1623 provides in pertinent part:

> (a) Whoever under oath in any proceeding before . . . [a] grand jury of the United States knowingly makes any false material declaration . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Q. Now, at that time did you see Mr. Brown?

A. No. I told you I went down there for a fishing trip, not fishing trip, to look at a boat for Dr. Slawek and then go to Puerto Rico.

Q. And you only stayed in Florida about three days?

A. About three or four days, something like that. I'm not sure exactly. Don't hold me to three or four. It was around that. I spent a total time of about two weeks between the two, including flight time and so on.

Q. When you were down there, did you call up Harry Brown to talk to him?

A. No.

Q. Did you know he was down there?

A. I heard he was down there. Somebody had said he was down there.

Q. Did you do anything to attempt to contact Mr. Brown when you were down there?

A. Not that I remember. I don't think I knew where he was at.

Q. Well, how did you find out where he was at eventually?

A. Somebody had told me about it and I don't know who, but they told me he was down in Florida.

Q. Okay. By this time, had the papers reported that Harry Brown was missing?

A. I don't believe so. I don't know. I'm not sure. I'm trying to recollect. I don't know whether they said he was missing or not.

Q. So, in December, when you were down there, you're sure you didn't try to contact Harry Brown; is that correct ?

A. Yeah, Yeah.

Q. Did you try to locate Harry Brown when you were down there?

A. No.

Q. You're sure?

A. Positive.

Q. Now, did you tell anyone that you were trying to locate Harry Brown in Florida?

A. Not that I remember.

Q. And, you know, you were on your vacation and you were looking at the boats, so you weren't running around trying to find somebody you didn't know where they were, is that correct?

A. Yeah.

Q. And you would remember that?

A. Yeah, I think I would.

WHEREAS, in truth and fact, as STANLEY APFELBAUM then well knew, he had tried to locate Francis Harry Brown, aka Harry Brown, in Florida, during December of 1975.

With respect to Apfelbaum's failure to recall his loan discussion with the F.B.I., paragraphs 4 and 5 of Count Two of the indictment recited Apfelbaum's grand jury testimony. That testimony and the charging clause follow:

Q. Did you ever tell anyone that you had lent any money to Harry Brown or Marvin Greenblatt?

A. No, sir.

Q. Did you ever tell anyone that you had been involved in a loan to Harry Brown or Marvin Greenblatt?

A. No, sir.

Q. You never told anyone that you had been involved in any kind of loan to Harry Brown?
A. No.

* * * *

Q. Did you ever tell the F.B.I.—you denied last week that you told anyone you had lent money to Harry Brown?
A. That's right.
Q. You denied that?
A. How could I lend money when I don't have any money myself, Mr. Friedman?
Q. So, you didn't tell the F.B.I. or anyone that you had lent money to Harry Brown?
A. No, sir.
Q. Is that right?
A. That's right.

* * * *

Q. Now, sir, in 19— what, 1975 and 1976, did you have $10,000?
A. Did I what?
Q. Have $10,000?
A. I told you I didn't have $10,000.
Q. And, you didn't lend $10,000 to Harry Brown, is that right?
A. No, sir.
Q. And, you testified that way last week.
A. Yeah.
Q. You testified last week that you never told anyone that you had lent $10,000 to Harry Brown; is that right?
A. That's right, sir.
Q. Okay. And, you still persist in that testimony?

A. Uh-huh. How can I lend it to him when I didn't have it? I had to go to the bank and borrow money myself.
Q. You still persist in that testimony?
A. Yes, sir.
Q. You never told the F.B.I. that you lent Harry Brown $10,000; is that right?
A. If I did, it was ridiculous.
Q. Did you tell them that?
A. I don't know. I don't think I did.
Q. Do you have any recollection of telling them that?
A. No, no sir.

WHEREAS, in truth and fact as STANLEY APFELBAUM then well knew, he (STANLEY APFELBAUM) had told someone, to wit, agents of the Federal Bureau of Investigation, that he (STANLEY APFELBAUM) had lent ten thousand dollars ($10,000) to Harry Brown.[4]

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[4] The indictment (Indictment No. 77-317) is reproduced in full at App. 14a-25a.

Apfelbaum had been the subject of an earlier indictment which charged three counts of violating 18 U.S.C. § 1623. The district court dismissed that indictment however because each of the three counts failed to allege sufficiently why the allegedly false statements were *material* to the grand jury investigation. *See* United States v. Slawik, 548 F.2d 75 (3d Cir. 1977). *And see* United States v. Tonelli, No. 77-2414 (3d Cir. Apr. 28, 1978). Apfelbaum was then re-indicted under Indictment No. 77-317 which charged two counts of violating § 1623. As explained by Apfelbaum:

> The substantial difference between the first and second indictments was the allegations regarding materiality. The new indictment spelled out in more detail the subject matter of the grand jury investigation and how Mr.

At the trial upon the indictment, the Government produced evidence in support of its charges that Apfelbaum's statements to the grand jury were false.[5] In addition, the Government produced evidence that Apfelbaum knew his statements were false. In proving its case in chief, the Government introduced a series of excerpts taken from the transcript of Apfelbaum's immunized grand jury testimony. The immunized testimony introduced at trial related to a range of topics relevant to the prosecution's case. These included *inter alia* (1) the degree of friendship between Apfelbaum and Brown (App. 96a-98a); (2) the circumstances surrounding Apfelbaum's discovery of, and visit to, Brown in Florida in 1976 (App. 107a, 110a, 124a-29a); (3) whether Apfelbaum and Brown discussed any loan transactions while in Florida (App. 112a); (4) whether Brown "patted down" Apfelbaum for weapons during his visit, or merely hugged him (App. 113a); (5) Apfelbaum's denial that he ever engaged in financial trans-

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Apfelbaum's false statements tended to influence or impede the grand jury's investigation.

Appellant's Brief at 15. Apfelbaum therefore does not challenge on appeal the materiality of the charges contained in Indictment No. 77-317.

[5] That evidence demonstrated that Apfelbaum did indeed try to find Harry Brown in Florida in December, 1975, but could not locate him. Further, the evidence showed that on March 16, 1976, Apfelbaum told the FBI agents in an interview that he tried to locate Brown in Florida because he had loaned $10,000 to Brown in an "extremely complicated arrangement" and wanted to recover his money.

actions with the Chestnut Hill dealership other than a $500 loan (App. 114a); (6) Apfelbaum's denial that he ever co-signed a loan for Brown (App. 115a); (7) a statement that Apfelbaum was introduced to one John Orem by Harry Brown (App. 116).[6] Apfelbaum objected to the introduction of this testimony.[7]

The jury returned a verdict of guilty on both counts of false swearing. Apfelbaum was sentenced to concurrent terms of two years in prison. His appeal charges, among other alleged errors, that the fifth amendment's privilege against self-incrimination precluded the admission at trial of his immunized grand jury testimony. It is to that issue that we turn.

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[6] In its brief the Government does not dispute that the experts of grand jury testimony, as noted above, were introduced at trial.

[7] Although Apfelbaum objected to the testimony summarized in text above, he did not object to any testimony reproduced in the indictment, nor to the admission at trial of other immunized grand jury testimony. The Government has not raised, nor has it argued, whether this failure to object constituted a waiver of any defect in the indictment, or a waiver which would permit the entire grand jury testimony transcript to be introduced at trial, despite the partial objection. *See* Fed. R. Crim. P. 12. *See generally,* United States v. Rogers, 340 U.S. 367, 372-75 (1951) ("where criminating facts have been voluntarily revealed, the privilege cannot be invoked to avoid disclosure of the details"); Brown v. Walker, 161 U.S. 591 (1896). *See also In re* Neff, 206 F.2d 149 (3d Cir. 1953). In light of the Government's failure to raise this issue, we do not address it here. Stotler & Co., Inc. v. Amstar Corp. No. 77-1555, slip op. at 3 (3d Cir. July 5, 1978) (opinion sur petition for panel rehearing); *see* Singleton v. Wulff, 428 U.S. 106, 120 (1976).

II.

A.

The fifth amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." The privilege "assures that a citizen is not compelled to incriminate himself by his own testimony, . . . [and] usually operates to allow a citizen to remain silent when asked a question requiring an incriminatory answer." *Kastigar* v. *United States*, 406 U.S. 441, 461 (1972).

A competing constitutional interest however is that a duly constituted grand jury, "an integral part of our constitutional heritage" whose "historic office has been to provide a shield against arbitrary or oppressive action," *United States* v. *Mandujano*, 425 U.S. 564, 571 (1976) (plurality opinion of Burger, C.J.), has the "right to every man's evidence" to fulfill its historic office. *Kastigar* v. *United States*, 406 U.S. at 443; *see United States* v. *Mandujano*, 425 U.S. at 571. This "right" necessarily includes the authority to compel the attendance and the testimony of witnesses. *Id.; United States* v. *Calandra*, 414 U.S. 338, 345 (1974); *Kastigar* v. *United States*, 406 U.S. at 443. Yet the power to compel testimony is necessarily limited by the privilege against self-incrimination. *Id.* at 346; *see United States* v. *Mandujano*, 425 U.S. at 573; *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892). Any testimony compelled in violation of that privilege may, along with its fruits, be suppressed. *United States* v. *Blue*, 384 U.S. 251, 255-56 (1966).

Accommodation of these interests has been achieved by the use of immunity.

> [It] is the Government's ultimate tool for securing testimony that would otherwise be protected; . . . [w]hen granted immunity, a witness once again owes the obligation imposed upon all citizens—the duty to give testimony—*since immunity substitutes for the privilege.*

United States v. *Mandujano*, 425 U.S. at 576 (emphasis added).

A grant of "use and fruits" immunity conferred under 18 U.S.C. § 6002[8] may indeed substitute for the fifth amendment privilege, but only because its protection against the subsequent use of the compelled testimony is *coextensive* with the scope of the privilege. *Kastigar* v. *United States*, 406 U.S. at 453. That is, the grant of the immunity must, by defini-

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[8] That provision reads in full:

> § 6002. Immunity generally
>
> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> (1) a court or grand jury of the United States . . . the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but *no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.*

(Emphasis added.)

tion, afford the witness the same protection he would have received had he invoked the privilege. *See Kastigar* v. *United States*, 406 U.S. at 462; *United States* v. *Frumento*, 552 F.2d 534, 542-43 (3d Cir. 1977) (en banc); *United States* v. *Kurzer*, 534 F.2d 511, 516 (2d Cir. 1976). Because a witness who has properly invoked the privilege may remain silent, *see Kastigar* v. *United States*, 406 U.S. at 461, use and fruits immunity under section 6002 "prohibits the prosecutorial authorities from using the compelled testimony in *any* respect." *Id.* at 453 (emphasis in original); *accord, United States* v. *Frumento*, 552 F. 2d at 543; *United States* v. *Hockenberry*, 474 F.2d 247 (3d Cir. 1973). Put another way, invocation of the privilege would have left Apfelbaum in a position where he would not have answered questions, truthfully or falsely, and thus such answers could not have been used against him. In the words of the Constitution, he would not have been compelled to "be a witness against himself."

Perjury however is a violation of an independent criminal statute, and as a practical matter, if immunity constituted a license to lie, the purpose of immunity would be defeated. Thus in order to preserve the integrity of the truth-seeking process, *see United States* v. *Mandujano*, 425 U.S. at 576, a narrow exception to immunity has been carved out. That exception permits prosecution for perjurious statements made under a grant of immunity. Indeed, the Supreme Court has observed that false swearing "has no place whatever" in the "constitutional process of

securing a witness' testimony." *Id.* "The Fifth Amendment privilege does not condone perjury; . . . [nor] endow the person who testifies with a license to commit perjury." *United States* v. *Wong*, 431 U.S. 174, 178 (1977) (even the predicament of being forced to choose between an inculpatory truth or falsehood does not justify perjury), *quoting Glickstein* v. *United States*, 222 U.S. 139, 142 (1911); *accord, United States* v. *Knox*, 396 U.S. 77, 82 (1969) (furnishing false information on a federal tax return in purported compliance with a statutory requirement is unprivileged); *see Harris* v. *New York*, 401 U.S. 222, 225, 226 (1971) (voluntary confessions obtained in violation of *Miranda* may be used to impeach a testifying defendant so as not to "pervert" "the shield provided by *Miranda* . . . into a license to use perjury"); *cf. United States* v. *Kahan*, 415 U.S. 239, 243 (1974) (testimony given by indigent in order to exercise the right to counsel may be effectively compelled and therefore protected from subsequent use, but it may not "be converted into a license for false representations"); Note, *Resolving Tensions Between Constitutional Rights: Use Immunity in Concurrent or Related Proceedings*, 76 Colum. L. Rev. 674 (1976).

The sanction of the perjury statute adequately protects against a witness making a mockery of immunity. Our court has accordingly held that although a witness's false immunized testimony may indeed subject him to a prosecution for perjury, *United States* v. *Frumento*, 552 F.2d at 543; *United States* v. *Hockenberry*, 474 F.2d at 249, the use of the witness's

immunized testimony is limited *only* to its use as *the basis of a perjury indictment.* As we explained in *Hockenberry,*

> [t]he immunity statute *properly permits prosecution* for perjury committed in an otherwise immunized statement *and also the introduction in evidence of so much of the statement as is essential to establishing the corpus delicti.*

474 F.2d at 249 (emphasis added).[9] Further than this, however, and consistent with the fifth amendment, the Government may not go. *See id.; United States* v. *Frumento,* 552 F.2d at 543 & n.16 ("[w]e reiterate our adherence to this principle; except as *the basis for a prosecution for perjury* a witness's immunized testimony may not be used against him")

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[9] As noted, *Hockenberry,* in defining the scope of the protection afforded by the immunity statute, limited the use of subsequent testimony to that "essential to establishing the *corpus delicti.*" In so holding however, there was apparently no need for the *Hockenberry* court to define the term *"corpus delicti"* more specifically. Here however, faced with a situation where there has been a wholesale introduction of immunized testimony at the defendant's trial, the need for defining *corpus delicti* with greater particularity becomes imperative. Thus, in the present context of a § 6002 immunity-perjury prosecution, we define *corpus delicti* to mean only the statement or statements of the defendant which the grand jury has charged to be perjurious, together with no more than that minimal testimony *essential* to place the charged falsehood into its proper context. *See* United States v. Patrick, 542 F.2d 381, 385 (7th Cir. 1976), *cert. denied,* 430 U.S. 931 (1977); United States v. DiOrio, 150 F.2d 938, 939-40 & n.1 (3d Cir.), *cert. denied,* 326 U.S. 771 (1945). Further, all of the testimony constituting the *corpus delicti* must be incorporated *in haec verba* in the perjury indictment.

(emphasis added). *And see Kastigar* v. *United States,* 406 U.S. 441, 453 (1972).

The introduction of immunized testimony in any subsequent proceeding is thus severely restricted. Other than as the *corpus delicti* of the indictment, the Government may not use immunized testimony as substantive evidence. *United States* v. *Frumento,* 552 F.2d at 541-43; *United States* v. *Hockenberry,* 474 F.2d at 249-50. As we have previously explained: "no one [could] clai[m] that [the appellant's immunized] responses could be used in the government's case in chief against him at a subsequent trial. Clearly such use would contravene *Kastigar.*" *United States* v. *Frumento,* 552 F.2d at 542. Nor may immunized testimony be used to impeach the testimony of the witness. *Id.* at 542-43; *United States* v. *Hockenberry,* 474 F.2d at 250. Again we have earlier explained:

> Clearly, if a witness had invoked his Fifth Amendment privilege, the government could have no testimony available with which it might impeach his subsequent sworn statements. Were we to permit impeachment with immunized testimony, we would then be affording the immunized witness something less than his full Fifth Amendment protection.

United States v. *Frumento,* 552 F.2d at 543.

B.

At Apfelbaum's trial, the Government introduced in support of its accusations a number of immunized statements made by Apfelbaum. The statements were

used to prove a wide variety of substantive matters in the case-in-chief. As we have explained, however, such use cannot be reconciled with Apfelbaum's privilege against self-incrimination. Nor may such use be harmonized with the scope of immunity afforded Apfelbaum by statute, because as the Supreme Court has declared, use and fruits immunity is, and must necessarily be, co-extensive with the privilege. *Kastigar* v. *United States*, 406 U.S. at 453. Thus, the introduction of immunized statements which did not form the core of, and which were not incorporated in, the indictment violated constitutional dictates, requiring the reversal of Apfelbaum's conviction.

C.

The Government however, seeking to justify the introduction of Apfelbaum's testimony, argues that a witness's immunized grand jury testimony is nonetheless admissible at a subsequent trial for false swearing where (as is alleged here), the immunized testimony is either "directly related" to the statement in the indictment charged as false, or where the immunized testimony is "not incriminating in itself," or where the immunized statement is "in all likelihood false." *See* Government's Brief at 11-14. We disagree.

We find no support or warrant for reading the "directly related" or "not incriminating in itself" exceptions into our prior caselaw. Rather, *Frumento* and *Hockenberry* unequivocally prohibit any subsequent use of truthful immunized testimony against

its speaker. We of course are bound by this precedent. Even were we not so bound, we would independently reach the same conclusion.

As to the Government's assertion that Apfelbaum's grand jury testimony was "in all likelihood false," we acknowledge that if it is false it is unprotected, and therefore would subject Apfelbaum to the risk of a perjury or a false statement prosecution. However until such time as the immunized statements are incorporated into a false swearing indictment as the *corpus delicti* of the indictment, the statements are unavailable for use by the Government at trial. Permitting the Government unrestricted use of any immunized statements whenever it supposes them to be false would necessarily vitiate the protection afforded by a grant of immunity and would effectively abrogate the immunity agreement. As the Second Circuit Court of Appeals has observed, and as we here hold, the proper remedy in the situation where the Government believes that immunized statements are false is not to disregard the immunity grant but rather is to prosecute the perjurious witness. *See United States* v. *Kurzer*, 534 F.2d at 518. *But cf. United States* v. *Traumunti*, 500 F.2d 1334 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974).

In short, we conclude that the three categories of immunized testimony asserted by the Government to be exceptions to the blanket protection afforded under a grant of immunity are in fact included within the ambit of the fifth amendment's protection. Thus the use of such testimony would trench upon a witness's

fifth amendment privilege. *United States* v. *Frumento*, 552 F.2d at 541-44; *United States* v. *Hockenberry*, 474 F.2d at 249-50; *see Kastigar* v. *United States*, 406 U.S. at 453; *cf. United States* v. *Berardelli*, 565 F.2d 24, 28-29 (2d Cir. 1977) (truthful immunized testimony may not be used to prove an earlier or later perjury but untruthful testimony may subject witness to prosecution for perjury); *United States* v. *Moss*, 562 F.2d 155, 165 (2d Cir. 1977), *cert. denied*, 46 U.S.L.W. 3535 (U.S. Mar. 6, 1978) ("acknowledgment by [witness] that [his immunized testimony] was perjurious rendered it usable" in subsequent proceeding); *United States* v. *Housand*, 550 F.2d 818, 823 (2d Cir.), *cert. denied*, 431 U.S. 970 (1977) (truthful, immunized testimony is not admissible to prove perjury); *United States* v. *Patrick*, 542 F.2d 381, 385-86 (7th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977) (two immunized statements may not be basis of an inconsistent declaration prosecution under 18 U.S.C. § 1623(c) because "perjury by inconsistent statements must necessarily be shown through the use of the immunized testimony"); *United States* v. *Kurzer*, 534 F.2d at 514-18; *United States* v. *Traumunti*, 500 F.2d 1334 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974) (false immunized testimony may be subsequently used for impeachment purposes and to demonstrate prior acts).[10] When applied to

[10] Our difficulty with the Second Circuit's rule as expressed in *Traumunti*, *Moss*, and *Berardelli* (among other cases) is that by permitting the subsequent use of arguably false, immunized testimony which is not the *corpus delicti* of a perjury

Apfelbaum these precepts require that his conviction be reversed, and that a new trial be granted, free from the impermissible use of protected testimony.

III.

We conclude that there is no merit in Apfelbaum's other contentions raised on this appeal. Hence they may be disposed of summarily.

A.

Apfelbaum urges us to go beyond reversing his conviction and a new trial. He contends that we should *dismiss* his two-count indictment for false swearing. This contention is based upon his argument that it was the same jury which not only heard his immunized testimony but which also returned his indictment for false swearing. He claims that this "same jury" procedure violated his privilege against self-incrimination because the grand jury was necessarily influenced to indict by having previously heard

indictment, the burden which the Government must carry to overcome immunity, and obtain a perjury conviction, is effectively lowered. Conviction for perjury requires that a jury find beyond a reasonable doubt that a false statement was made, and that it was knowingly false. By contrast, the Second Circuit's rule allows the government to obtain a conviction based on the admission of immunized testimony which is not the basis of any indictment and which the *court* finds, apparently on the basis of a preponderance of the evidence, to have been false. Further, it is unclear whether the Second Circuit requires a showing of scienter before the false immunized testimony is admitted.

his protected testimony. The short answer to this contention is that the record is deficient of any proofs that the grand jury which indicted Apfelbaum impermissibly relied on his immunized testimony. *See Lawn* v. *United States*, 355 U.S. 339, 348-49 (1958). In light of such a barren record, we decline Apfelbaum's invitation to address his purported constitutional violation, *see United States* v. *Anzalone*, 555 F.2d 317, 319-20 (2d Cir.), *aff'd on rehearing*, 560 F.2d 492 (2d Cir. 1977), *cert. denied*, 46 U.S.L.W. 3436 (U.S. Jan. 9, 1978) (rejecting a "same jury" claim); *United States* v. *Camporeale*, 515 F.2d 184 (2d Cir. 1975) (same); *cf. United States* v. *Hinton*, 543 F.2d 1002, 1010 n.9 (2d Cir. 1976), *cert. denied*, 429 U.S. 980, 1051, 1066 (1977) upholding a "same jury" claim when the subsequent indictment charged the substantive crimes under investigation but expressly distinguishing the situation when the subsequent indictment charges false swearing), or his suggested *per se* rule that "the government should be required to use a different grand jury to indict for perjury or false declarations." Appellant's Brief at 35. *See also United States* v. *Calandra*, 414 U.S. 338, 345 (1974) ("an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence [citation]; or even on the basis of information obtained in violation of a defendant's fifth amendment privilege against self-incrimination"); *Lawn* v. *United States*, 355 U.S. at 349.

B.

Apfelbaum also claims that the district court improperly instructed the jury as to his knowledge of the falsity of his statements because it used a *Mann* charge, *i.e.* one which states that "unless the evidence points otherwise," a jury may infer that "one intends the natural and probable consequences of an act." In *United States* v. *Garrett*, 574 F.2d 778 (3d Cir. 1978), *cert. denied*, 46 U.S.L.W. 3722 (U.S. May 22, 1978), our court, exercising its supervisory powers, adopted a rule disapproving use of the *Mann* charge in all trial commencing ninety days after the date of the *Garrett* decision. Apfelbaum's new trial which we have directed, necessarily will begin after that date. Thus, on remand and at re-trial, our *Garrett* decision will be controlling.

C.

Next, Apfelbaum argues that the use of certain evidence by the prosecutor, particularly the testimony of one John Orem, violated the rule announced by our court in *United States* v. *Crocker*, 568 F.2d 1049 (3d Cir. 1978). He further charges that the district court abused its discretion when it ruled that it would permit prospective character witnesses intending to testify favorably to the defendant's reputation for veracity to be cross-examined with reference to a newpaper article which implicated Apfelbaum's honesty. *See Michelson* v. *United States*, 335 U.S. 469 (1948); Fed. R. Evid. 608(b). Inasmuch

as we have ordered a new trial, it would be inappropriate for us to anticipate and rule upon claims which challenge the admissibility of evidence which has not as yet been, and may never be, introduced.

We will reverse Apfelbaum's judgment of conviction, and remand for a new trial consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-2427

UNITED STATES OF AMERICA

vs.

APFELBAUM, STANLEY, APPELLANT

(D.C. Criminal No. 77-317)

On Appeal from the United States District Court
For the Eastern District of Pennsylvania

Present: ADAMS, WEIS, and GARTH, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on June 6, 1978.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed October 28, 1977, be, and the same is hereby reversed and the cause is remanded for a new trial consistent with the opinion of this Court.

ATTEST:

/s/ M. Elizabeth Fergusen
Acting Clerk

August 10, 1978

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-2427

UNITED STATES OF AMERICA

v.

APFELBAUM, STANLEY, APPELLANT

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, *Circuit Judges*

The petition for rehearing filed by *Appellee* in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

LEONARD I. GARTH
Judge

Dated: October 16, 1978

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 270865 223

Supreme Court, U. S.
FILED
MAY 3 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-972

UNITED STATES OF AMERICA,

Petitioner

—*v.*—

STANLEY APFELBAUM

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 15, 1978
CERTIORARI GRANTED MARCH 19, 1979

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-972

UNITED STATES OF AMERICA,

Petitioner

—*v.*—

STANLEY APFELBAUM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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DOCKET ENTRIES

DATE	PROCEEDINGS
1977	
Jul 25	True Bill.
Jul 25	Entry of Appearance of Robert E. Madden, Esq. for U.S.A., filed.
Jul 25	Order that deft. be released on $5,000 O.R. bail, filed.
Jul 25	Bond of deft. in the sum of $5000—O.R., filed.
Aug. 2	PLEA: NOT GUILTY to Cts: 1 & 2. Deft. allowed 10 days to file motions. Trial set for 8-24-77, filed. RAP
Aug. 2	Appearance of J.H. Slomsky, Esq. for deft., filed.
Aug. 3	Order that deft. have until 8-19-77 to file any post trial motions, filed. VA-C1.
	8-3-77 entered & copies mailed
Aug. 5	Govt's motion for order compelling deft. to submit to fingerprinting, memo and cert. of service, file
Aug. 15	Govt's motion for handwriting exemplar and memo, filed.
Aug. 19	Deft's answer in opposition to motion for handwriting exemplars, filed.
Aug. 19	Deft's answer in opposition to motion for an order compelling deft. to submit to fingerprinting, filed.
Aug. 19	Deft's motion for a bill of particulars and memo, filed.
Aug. 19	Deft's motion for Govt. Agents to produce, retain and preserve rough notes, filed.
Aug. 19	Deft's motion to suppress identification evidence, filed.
Aug. 19	Deft's motion to suppress statement, filed.

DATE	PROCEEDINGS

1977

Aug. 19 Deft's motion for a pretrial hearing and ruling on materiality, filed.

Aug. 19 Deft's motion to dismiss the indictment and memo, filed.

Aug. 19 Deft's motion for a reasonable continuance, filed.

Aug. 23 Govt's answer to deft's motion to suppress statements of the deft. and identification and cert. of service, filed.

Aug. 23 Govt's answer to deft's motion for a pretrial hearing and ruling on materiality and cert. of service, filed.

Aug. 23 Govt's answer to deft's motion for Govt. Agents to produce, retain, and preserve rough notes and cert. of service, filed.

Aug. 23 Govt's answer to deft's motion for a continuance and cert. of service, filed.

Aug. 23 Govt's answer to deft's motion to dismiss the indictment and cert. of service, filed.

Aug. 25 Minute Sheet re: hearing—all pretrial motions:

Motion to dismiss indictment—denied.
Motion for bill of particulars—Granted.
Motion for Govt. agents to retain notes—Granted.
Motion to suppress identification & statement—Denied.
Motion for continuance—Granted—trial set for 9-26-77.
Motion for pretrial hearing on materiality—C.A.V.
Motion to produce handwriting & fingerprinting exemplars—C.A.V., filed. VA

Aug. 25 Order that Clerk incorporate into the record all motions, etc. on file in Crim. 77-172, filed. VA

Aug. 25 Deft's motion to dismiss the indictment and memo of law; deft's motion and memo of law for a bill of particulars; deft's motion to suppress statement; motion

DATE	PROCEEDINGS

1977

for govt. agents to produce, retain and preserve rough notes; motion to suppress identification evidence; Govt's response to deft's motion to dismiss indictment; Govt's answer to deft's motion to suppress statement; Govt's answer to deft's motion for Govt. agents to produce, retain and preserve rough notes; Govt's answer to deft's motion for a bill of particulars and Gov't answer to deft's motion to suppress identification evidence transferred from Crim. 77-172, filed.

Aug. 25 Transcript of 6-1-77 transferred to this case from Crim. 77-172, filed.

Sep. 12 Order that deft. appear on 9-16-77 at office of Atty. for Govt. and provide an exemplar of handwriting, etc., filed. VA
9-13-77 entered & copies mailed

Sep. 20 Govt's proposed examination of prospective jurors, filed.

Sep. 27 Order of Court re: sequestration of jury and duties of Marshals, filed. VA
9-27-77 entered & copies mailed

Sep. 27 Waiver of presence of court stenographer at drawing of jury panel members, filed.

Sep. 27 Minute Sheet dated 9-26-77 re: Voir Dire, filed. VA

Sep. 28 Minute Sheet dated 9-27-77 re: Jury called and sworn. TRIAL—witnesses sworn, filed. VA

Sep. 30 Govt's proposed instructions, filed.

Sep. 30 Deft's proposed jury instructions, filed.

Sep. 30 Stipulation that transcripts of deft's grand jury appearances of Dec. 13, 1976 and Jan. 3, 1977 be made available to court for review prior to trial, filed.

DATE	PROCEEDINGS
1977	
Sep. 30	Minute Sheet dated 9-29-77 re: trial resumes.
	Motion for mistrial—denied; motion for judgment of acquittal—denied
	VERDICT: GUILTY to Cts. 1 & 2. Sentence set for 10-28-77, filed.
Oct. 6	Deft's motion and memo of law for a new trial and/or for a judgment of acquittal
Oct. 17	Govt's Answer to Deft's Motion for New Trial and/or For a Judgment of Acquittal, filed.
Oct. 27	Argued sur: deft's motion for new trial and/or judgment of acquittal—Denied, filed. VA
Oct. 28	SENTENCE: Ct. 1—Impr. 2 yrs. Ct. 2—like sent. imposed conc., filed. VA
Oct. 28	Judgment and Commitment Order, filed. VA 10-28-77 entered
Nov. 1	Minute Sheet dated 9-28-77 re: trial resumes, filed.
Nov. 1	Deft's notice of appeal received on 11-1-77 at 3:05 p.m., filed. 11-2-77 entered & copies mailed
Nov. 1	Copy of Clerk's notice to U.S. Court of Appeals, filed.
Nov. 10	Cert. copy of order of U.S. Court of Appeals setting briefing schedule, filed.
Nov. 23	Cert. copy of Order of U.S. Court of Appeals granting motion for appointment of counsel and counsel will be appointed, filed.

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

D.C. Crim. No. 77-317

Miscellaneous No. 76-157

[Filed October —, ——]

IN RE: GRAND JURY INVESTIGATION

ORDER

AND NOW, this 20th day of October, 1976, upon consideration of the Petition by the United States of America for an Order of Immunization and to compel the giving of testimony before the Grand Jury, and the Court, and following a hearing at which STANLEY APFELBAUM was present, with counsel, the Court finds as follows:

1. That STANLEY APFELBAUM has been called to testify or provide other information before the Grand Jury of the United States presently empaneled within this District; and

2. That in the judgment of said United States Attorney, said STANLEY APFELBAUM has refused to testify or provide other information on the basis of his privilege against self-incrimination; and

3. That in the judgment of the said United States Attorney, the testimony or other information from said STANLEY APFELBAUM may be necessary to the public interest; and

4. That the aforesaid Motion filed herein has been made with the approval of the Assistant Attorney General of the United States Department of Justice pursuant to the authority vested in him by Title 18, United States Code, Section 6003, and Title 28, Code of Federal Regulations, Section 0.175;

NOW, THEREFORE, IT IS ORDERED pursuant to Title 18, United States Code, Section 6002, that the said STANLEY APFELBAUM give testimony or provide other information which he refused to give or to provide on the basis of his privilege against self-incrimination as to all matters about which he may be interrogated before said Grand Jury, but that no testimony or other information compelled under this Order, or any information directly or indirectly derived from such testimony or other information, may be used against STANLEY APFELBAUM in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this Order.

IT IS FURTHER

ORDERED

that STANLEY APFELBUUM [sic] shall appear before the Grand Jury at 10:00 A.M. on the 1st day of NOVEMBER, 1976, at Room 4716, United States Courthouse, Philadelphia, Pennsylvania and answer all questions propounded to him there, relating to possible violations under Title 18, United States Code, Sections 1962, 1341, and 892, as well as in any other proceeding or trial which may result from the Grand Jury's current inquiry, and to produce any and all books, papers and other evidence requested as otherwise provided by law.

/s/ [Illegible]
J.

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Criminal Number: 77-317

Title 18, United States Code, Section 1623

[Filed: October 26, 1977]

UNITED STATES OF AMERICA

v.

STANLEY APFELBAUM

INDICTMENT

COUNT I

THE GRAND JURY CHARGES:

1. That on the 13th day of December, 1976, in the Eastern District of Pennsylvania, STANLEY APFELBAUM, defendant herein, under oath as a witness in a proceeding before a Grand Jury, duly impaneled and sworn in the United States District Court for the Eastern District of Pennsylvania, and inquiring in a matter then and there pending before the said Grand Jury, knowingly made a false declaration, that is to say:

2. That, at the time and place aforesaid, the Grand Jury inquiring as aforesaid, was conducting an investigation to determine:

a. whether Marvin Greenblatt who was the President of Chestnut Hill Lincoln-Mercury, Inc. and Francis Harry Brown, aka Harry Brown, who was the General Manager of Chestnut Hill Lincoln-Mercury, Inc. and other individuals had committed violations of the criminal laws of the United States;

b. whether Marvin Greenblatt and Francis Harry Brown, aka Harry Brown, had, in fact, staged a robbery of Chestnut Hill Lincoln-Mercury, Inc., on April 16,

1975, in which Marvin Greenblatt and Harry Brown alleged $175,000.00 in cash was taken;

c. what motivated Marvin Greenblatt and Francis Harry Brown, aka Harry Brown, to stage the robbery of Chestnut Hill Lincoln-Mercury, Inc.;

d. what Marvin Greenblatt and Francis Harry Brown, aka Harry Brown, did with the cash that was received at Chestnut Hill Lincoln-Mercury, Inc. on April 16, 1975;

e. whether Marvin Greenblatt, Francis Harry Brown, aka Harry Brown, or Chestnut Hill Lincoln-Mercury, Inc. were in loanshark debt to Frank Sindone, Joseph Ciancaglini, John Berkey, Vincent "Tippy" Panetta, or others;

f. whether one of the purposes of staging the April 16, 1975, robbery of Chestnut Hill Lincoln-Mercury, Inc. was to repay loanshark debts;

g. whether Marvin Greenblatt and Francis Harry Brown, aka Harry Brown, were engaged in making extortionate extensions of credit to others, through Chestnut Hill Lincoln-Mercury, Inc.;

h. whether the money Marvin Greenblatt and Francis Harry Brown, aka Harry Brown, used to make extortionate extensions of credit was their own money or did they receive the funds from Frank Sindone, Joseph Ciancaglini or others;

i. why so many of the cars that were sold on the day of the staged robbery were sold to individuals that were closely associated with those involved in organized criminal activity;

j. whether Frank Sindone actually controlled Chestnut Hill Lincoln-Mercury, Inc.;

k. whether Marvin Greenblatt and Francis Harry Brown, aka Harry Brown, had, in fact, defrauded Allstate Finance Company on a fraudulent $6,000.00 loan, and if so, what Marvin Greenblatt and Francis Harry Brown, aka Harry Brown, did with the money;

l. whether Marvin Greenblatt and Francis Harry Brown, aka Harry Brown, had, in fact, defrauded Herbert Bernstein out of $30,000.00 and if so, what Marvin Greenblatt and Francis Harry Brown, aka Harry Brown, did with the money;

m. whether Marvin Greenblatt and Francis Harry Brown, aka Harry Brown, had, in fact, defrauded American Express Company out of $40,000 and if so, what Marvin Greenblatt and Francis Harry Brown, aka Harry Brown, did with the merchandise they purchased with their American Express cards;

n. whether Marvin Greenblatt and Francis Harry Brown, aka Harry Brown, had, in fact, defrauded Eagle Clothes, Inc. out of $25,000 in merchandise and if so, what Marvin Greenblatt and Francis Harry Brown, aka Harry Brown, did with the merchandise they obtained from Eagle Clothes, Inc.;

o. whether Marvin Greenblatt and Francis Harry Brown, aka Harry Brown, had, in fact, defrauded Dr. Richard Lynch out of $20,000 and if so, what Marvin Greenblatt and Francis Harry Brown, aka Harry Brown, did with the money; and

p. whether STANLEY APFELBAUM and F. Emmett Fitzpatrick were accessories after the fact or aided and abetted the staged April 16, 1975, robbery.

All of the above said issues were material to determine whether violations of the criminal laws of the United States had occurred, to wit, extortionate extensions of credit, racketeer influenced and corrupt organizations, mail fraud, conspiracy and accessory after the fact; Sections 891, *et seq.*, 1961 *et seq.*, 1341, 371 and 3, Title 18, United States Code, and violations of other criminal statutes of the United States.

3. In attempting to determine the answers to the questions posed in paragraphs two (2) above, and in gathering the evidence necessary to determine whether an indictment for violations of the laws of the United States should be returned, the Grand Jury had before it certain allegations and information including:

a. that the April 16, 1975, $175,000 robbery of Chestnut Hill Lincoln-Mercury, Inc. was, in fact, staged by Francis Harry Brown, aka Harry Brown, and Marvin Greenblatt;

b. that STANLEY APFELBAUM was at Chestnut Hill Lincoln-Mercury, Inc. on April 16, 1975, the night of the staged robbery;

c. that Francis Harry Brown, aka Harry Brown, and Marvin Greenblatt were in loanshark debt to Frank Sindone and Vincent "Tippy" Panetta;

d. that Francis Harry Brown, aka Harry Brown, and Marvin Greenblatt were making extortionate extensions of credit to other individuals through Chestnut Hill Lincoln-Mercury, Inc.;

e. that a few days after the staged robbery of Chestnut Hill Lincoln-Mercury, Inc., Francis Harry Brown, aka Harry Brown, and Marvin Greenblatt met with STANLEY APFELBAUM in his office in City Hall, and that STANLEY APFELBAUM, Marvin Greenblatt and Francis Harry Brown, aka Harry Brown, then went and saw F. Emmett Fitzpatrick in the District Attorney's Office;

f. that on or about August of 1975, Francis Harry Brown, aka Harry Brown, left the Philadelphia area, in a clandestine manner without leaving any forwarding address;

g. that the Federal Bureau of Investigation was able to trace Francis Harry Brown, aka Harry Brown, to the Fort Lauderdale, Florida, area. While trying to locate Francis Harry Brown, aka Harry Brown, the Federal Bureau of Investigation discovered that STANLEY APFELBAUM of the Philadelphia District Attorney's office was also trying to find Francis Harry Brown, aka Harry Brown;

h. that when the Federal Bureau of Investigation found Francis Harry Brown, aka Harry Brown, he told them that F. Emmett Fitzpatrick had lent him (Francis Harry Brown, aka Harry Brown) $10,000 prior to Brown's leaving the Philadelphia area. However, Brown refused to explain the details of the loan or what he did with the money;

i. STANLEY APFELBAUM told Federal Bureau of Investigation agents that he (STANLEY APFELBAUM) was trying to locate Francis Harry Brown, aka Harry Brown, in Florida in December of 1975 because he (STANLEY APFELBAUM) had lent Francis Harry Brown, aka Harry Brown, $10,000 prior to the staged robbery of Chestnut Hill Lincoln-Mercury, Inc.;

j. STANLEY APFELBAUM told the Federal Bureau of Investigation that he (STANLEY APFELBAUM) had been co-signer of the $10,000 loan, and that it was an extremely complicated arrangement;

k. STANLEY APFELBAUM would not elaborate on the details of the $10,000 loan;

l. STANLEY APFELBAUM told the Federal Bureau of Investigation that the main reason he was attempting to contact Francis Harry Brown, aka Harry Brown, was to get this money back and that the Philadelphia District Attorney's office had no active investigation of the Chestnut Hill Lincoln-Mercury, Inc. robbery;

m. F. Emmett Fitzpatrick told Federal Bureau of Investigation agents that he had never lent Francis Harry Brown, aka Harry Brown, any money nor had he ever arranged for or signed for any loan for Francis Harry Brown, aka Harry Brown;

n. Francis Harry Brown, aka Harry Brown, refused to answer any questions before the Grand Jury;

4. Based upon the information and questions contained in paragraph two (2) and three (3) above, the Grand Jury desired to question STANLEY APFELBAUM concerning the following:

a. what was STANLEY APFELBAUM's relationship with Francis Harry Brown, aka Harry Brown, and Marvin Greenblatt;

b. had Francis Harry Brown, aka Harry Brown, or Marvin Greenblatt said anything to STANLEY APFELBAUM on April 16, 1975, the night of the staged robbery, that would be helpful to the Grand Jury in proving that Francis Harry Brown, aka Harry Brown, and Marvin Greenblatt, in fact, staged the robbery or why they staged the robbery or what they did with the money;

c. had Francis Harry Brown, aka Harry Brown, or Marvin Greenblatt said anything to STANLEY APFELBAUM when they visited the District Attorney's office a few days after the robbery that would be helpful to the Grand Jury in proving that Francis Harry Brown, aka Harry Brown, and Marvin Greenblatt, in fact, staged

the robbery, why they staged the robbery, or what they did with the money;

d. did STANLEY APFELBAUM or F. Emmett Fitzpatrick either loan Francis Harry Brown, aka Harry Brown, ten thousand dollars ($10,000) or in some way arrange for a loan to Francis Harry Brown, aka Harry Brown, of ten thousand dollars ($10,000) and, if so, why did Francis Harry Brown, aka Harry Brown, tell STANLEY APFELBAUM that he needed the money;

e. did Francis Harry Brown, aka Harry Brown, or Marvin Greenblatt tell STANLEY APFELBAUM that the ten thousand dollars ($10,000) loan was needed by Francis Harry Brown, aka Harry Brown, or Marvin Greenblatt to repay loanshark debts to Frank Sindone or others;

f. did Francis Harry Brown, aka Harry Brown, or Marvin Greenblatt ever tell STANLEY APFELBAUM that Frank Sindone, Philip Testa or Joseph Ciancaglini either owned or controlled Chestnut Hill Lincoln-Mercury, Inc.;

g. if STANLEY APFELBAUM did not, in fact, loan Francis Harry Brown, aka Harry Brown, ten thousand dollars ($10,000), why did he tell the Federal Bureau of Investigation that he had;

h. why was STANLEY APFELBAUM in Florida trying to locate Francis Harry Brown, aka Harry Brown, in December of 1975? Was he trying to recover the ten thousand dollars ($10,000)? Was he trying to find out if Francis Harry Brown, aka Harry Brown, had agreed to cooperate with the Grand Jury in their investigation? Was STANLEY APFELBAUM attempting to gain assurance from Francis Harry Brown, aka Harry Brown, that he (Francis Harry Brown, aka Harry Brown) was not cooperating with the Federal Grand Jury?

5. That at the time and place alleged in paragraph one (1), herein, STANLEY APFELBAUM, defendant herein, appeared as a witness before the aforesaid Grand Jury, and then and there being under oath as alleged in paragraph one (1) made the following declarations:

Q. It's my understanding you went down to Florida in December of 1975, approximately the 5th of December.
A. That's right. That's what I said before.
Q. Now, at that time did you see Mr. Brown?
A. No. I told you I went down there for a fishing trip, not fishing trip, to look at a boat for Dr. Slawek and then go to Puerto Rico.
Q. And you only stayed in Florida about three days?
A. About three or four days, something like that. I'm not sure exactly. Don't hold me to three or four. It was around that. I spent a total time of about two weeks between the two, including flight time and so on.
Q. When you were down there, did you call up Harry Brown to talk to him?
A. No.
Q. Did you know he was down there?
A. I heard he was down there. Somebody had said he was down there.
Q. Did you do anything to attempt to contact Mr. Brown when you were down there?
A. Not that I remember. I don't think I knew where he was at.
Q. Well, how did you find out where he was at eventually?
A. Somebody had told me about it and I don't know who, but they told me he was down in Florida.
Q. Okay. By this time, had the papers reported that Harry Brown was missing?
A. I don't believe so. I don't know. I'm not sure. I'm trying to recollect. I don't know whether they said he was missing or not.
Q. So, in December, when you were down there, you're sure you didn't try to contact Harry Brown; is that correct?
A. Yeah, Yeah.
Q. Did you try to locate Harry Brown when you were down there?
A. No.

Q. You're sure?
A. Positive.
Q. Now, did you tell anyone that you were trying to locate Harry Brown in Florida?
A. Not that I remember.
Q. And, you know, you were on your vacation and you were looking at the boats, so you weren't running around trying to find somebody you didn't know where they were, is that correct?
A. Yeah.
Q. And you would remember that?
A. Yeah, I think I would.

WHEREAS, in truth and fact, as STANLEY APFELBAUM then well knew, he had tried to locate Francis Harry Brown, aka Harry Brown, in Florida, during December of 1975.

6. These false statements tended to influence, impede and hamper the Grand Jury from pursuing:

a. the nature of STANLEY APFELBAUM's relationship with Francis Harry Brown, aka Harry Brown;
b. why STANLEY APFELBAUM was going to Florida in an attempt to locate Francis Harry Brown, aka Harry Brown;
c. whether STANLEY APFELBAUM, in fact, did locate Francis Harry Brown, aka Harry Brown, in Florida in December of 1975 and if so, whether they discussed any of the allegations or information contained in paragraphs two (2) or three (3) above and what the nature of those discussions were.
d. whether STANLEY APFELBAUM discussed the ten thousand dollar ($10,000.00) loan with Francis Harry Brown, aka Harry Brown, and what Francis Harry Brown, aka Harry Brown, told him (STANLEY APFELBAUM) that he (Harry Brown) needed the ten thousand dollars ($10,000.00) for;
e. whether STANLEY APFELBAUM discussed the Grand Jury investigation of Chestnut Hill Lincoln-Mercury, Inc., with Francis Harry Brown, aka Harry Brown, and/or Marvin Greenblatt;

f. whether STANLEY APFELBAUM attempted to have Francis Harry Brown, aka Harry Brown, not cooperate with the Federal Grand Jury or to hide STANLEY APFELBAUM's involvement in any illegal activity;
g. why Francis Harry Brown, aka Harry Brown, left the Philadelphia area in the manner he did.

All in violation of Title 18, United States Code, Section 1623.

COUNT II

THE GRAND JURY FURTHER CHARGES:

1. That on the 13th day of December, 1976, in the Eastern District of Pennsylvania, STANLEY APFELBAUM, defendant herein, under oath as a witness in a proceeding before a Grand Jury, duly impaneled and sworn in the United States District Court for the Eastern District of Pennsylvania, and inquiring in a matter then and there pending before the said Grand Jury, knowingly made a false declaration, that is to say:

2. The Grand Jury incorporates by reference and realleges all of the allegations of paragraphs two (2), three (3), and four (4) of Count I of this indictment as if set forth in full herein and further charges:

3. That on the 13th day of December, 1976, at the place alleged in paragraph one (1), herein, STANLEY APFELBAUM, defendant herein, appeared as a witness before the aforesaid Grand Jury, and then and there being under oath as alleged in paragraph one (1), made the following declarations:

Q. Did you ever tell anyone that you had lent any money to Harry Brown or Marvin Greenblatt?
A. No, sir.
Q. Did you ever tell anyone that you had been involved in a loan to Harry Brown or Marvin Greenblatt?
A. No, sir.

Q. You never told anyone that you had been involved in any kind of loan to Harry Brown?
A. No.

5. That on the 3rd day of January, 1977, at the place alleged in paragraph one (1), herein, STANLEY APFELBAUM, defendant herein, appeared as a witness before the aforesaid Grand Jury, and then and there being under oath as alleged in paragraph one (1), made the following declarations:

Q. Did you ever tell the F.B.I.—you denied last week that you told anyone you had lent money to Harry Brown?
A. That's right.
Q. You denied that?
A. How could I lend money when I don't have any money myself, Mr. Friedman?
Q. So, you didn't tell the F.B.I. or anyone that you had lent money to Harry Brown?
A. No, sir.
Q. Is that right?
A. That's right.

* * * *

Q. Now, sir, in 19—what, 1975 and 1976, did you have $10,000?
A. Did I what?
Q. Have $10,000?
A. I told you I didn't have $10,000.
Q. And, you didn't lend $10,000 to Harry Brown, is that right?
A. No, sir.
Q. And, you testified that way last week.
A. Yeah.
Q. You testified last week that you never told anyone that you had lent $10,000 to Harry Brown; is that right?
A. That's right, sir.
Q. Okay. And, you still persist in that testimony?
A. Uh-huh. How can I lend it to him when I didn't have it? I had to go to the bank and borrow money myself.

Q. You still persist in that testimony?
A. Yes, sir.
Q. You never told the F.B.I. that you lent Harry Brown $10,000; is that right?
A. If I did, it was ridiculous.
Q. Did you tell them that?
A. I don't know. I don't think I did.
Q. Do you have any recollection of telling them that?
A. No, no, sir.

WHEREAS, in truth and fact as STANLEY APFELBAUM then well knew, he (STANLEY APFELBAUM) had told someone, to wit, agents of the Federal Bureau of Investigation, that he (STANLEY APFELBAUM) had lent ten thousand dollars ($10,000) to Harry Brown.

5. These false statements tended to influence, impede and hamper the Grand Jury from pursuing:

a. the nature of STANLEY APFELBAUM's relationship with Francis Harry Brown, aka Harry Brown;

b. what Francis Harry Brown, aka Harry Brown, told STANLEY APFELBAUM the purpose of the ten thousand dollar ($10,00.00) loan was;

c. whether Francis Harry Brown, aka Harry Brown, told STANLEY APFELBAUM that the ten thousand dollars ($10,000.00) was to pay off loanshark debts to Frank Sindone or others;

d. whether Francis Harry Brown, aka Harry Brown, told STANLEY APFELBAUM that the ten thousand dollars ($10,000.00) was going to be lent out to others by Francis Harry Brown, aka Harry Brown, or Marvin Greenblatt at usurious interest rates;

e. if STANLEY APFELBAUM did not, in fact, lend Francis Harry Brown, aka Harry Brown, ten thousand dollars ($10,000.00), why did he tell the Federal Bureau of Investigation that he had lent Francis Harry Brown, aka Harry Brown, ten thousand dollars ($10,000.00);

f. did F. Emmett Fitzpatrick or Francis Harry Brown, aka Harry Brown, ask STANLEY APFELBAUM to tell the Federal Bureau of Investigation that he (STANLEY APFELBAUM) had, in fact, lent ten thousand dollars ($10,000.00) to Francis Harry Brown, aka Harry Brown;

g. whether STANLEY APFELBAUM and Francis Harry Brown, aka Harry Brown, discussed any of the allegations or information contained in paragraphs two (2) or three (3) of Count I of this Indictment and what the nature of those discussions were.

All in violation of Title 18, United States Code, Section 1623.

A TRUE BILL:

_____

Foreman

_____

DAVID W. MARSTON
United States Attorney
Eastern District of Pennsylvania

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

_____

Criminal No. 77-317

THE UNITED STATES OF AMERICA

vs.

STANLEY APFELBAUM

_____

September 27, 1977

_____

BEFORE: THE HONORABLE DONALD W. VAN ARTSDALEN
(and sequestered Jury)

_____

APPEARANCES:

ROBERT MADDEN, ESQ.,

—and—

RONALD COLE, ESQ.,
Assistant U. S. Attorneys

JOEL SLOMSKY, ESQ.,
Attorney for the Defendant

PORTIONS OF PROCEEDINGS IN THE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
HELD ON SEPTEMBER 27, 1977

* * * *

[34] MR. MADDEN: The next witness will be the court reporter from the Grand Jury.

The Government has sat down with Mr. Slomsky in an attempt to see if we couldn't agree as to exactly what

portions of the Grand Jury transcript would go in. We have delineated approximately eighty percent or [35] seventy percent of the Grand Jury testimony. However, there are points that we disagree at. I have copies of the Grand Jury transcript and I have highlighted, for the Court, the areas where we do disagree. I would think that perhaps if we could settle those disagreements, have rulings on those disagreements prior to bringing the witness in it would alleviate the necessity of having to object during the witness' testimony and also might allow the Government to give Grand Jury transcripts to the jurors so that they can better follow the testimony.

THE COURT: All right. Do you have those?

MR. MADDEN: Yes, I do, your Honor.

I first hand up the December 13, 1975 testimony.

THE COURT: Suppose we have that marked as G-1 for purposes of identification.

MR. MADDEN: That is the number I intend to give it.

THE COURT: I am marking that G-1 on here myself.

Is it my understanding that this portion [36] of—or that all of G-1, counsel agree, may go to the jury or can be admitted, if identified by the court reporter, with the exception of certain portions that are underlined or red lined in some way?

MR. SLOMSKY: No. I have received G-1. I received it last night, your Honor, and I do have a limited number of changes. Perhaps there was some misunderstanding between Mr. Madden and myself, but they're not extensive and I think I can relate them to the Court very quickly.

With respect to Pages 10 and 11 of G-1, I object to those being read to the jury.

THE COURT: Any portion of them?

MR. SLOMSKY: Yes. All of Page 10 and Page 11.

THE COURT: All right. What else?

MR. SLOMSKY: With respect to Page 28, the question at the bottom of the page: "Was Mr. Greenblatt ever there?" To the bottom of that page and the first answer on Page 29.

THE COURT: All right.

MR. SLOMSKY: On page 31 the first [37] question and answer above the pink portion on the right beginning: "Has Emmett Fitzpatrick—" and the answer is "No" also deleted.

With respect to Page 98, the last question and answer on that page, question beginning: "Now at that time—" and the answer "No, sir."

Of course I also object to all of the questions and answers delineated with the pink on the right-hand portion of the page.

THE COURT: All right.

MR. SLOMSKY: Perhaps we can have the other exhibit marked G-2.

THE COURT: All right.

MR. MADDEN: This is January 3rd, 1977.

THE COURT: Are there other things on G-2 other than what are marked on the pink?

MR. SLOMSKY: Yes, sir. On Page 42, the last answer. Page 56.

Now there is an answer which, from Page 55, which is completed on the top line of Page 56. Mr. Madden has this page marked as objected to. I have no objection to the [38] balance of this page being read.

THE COURT: Wait. It's shown here that you object to all of Page 55.

MR. SLOMSKY: That is correct.

THE COURT: Well, all of Page 53, 54, 55 and 56?

MR. SLOMSKY: Now there is an answer on Page 56, on the very top line, which is to be completed from Page 55.

THE COURT: All right.

MR. SLOMSKY: Now I have no objection to reading the balance of that page.

THE COURT: Okay.

MR. SLOMSKY: They have it marked objected to.

THE COURT: Yes.

MR. SLOMSKY: Page 79. The very last question asked by Mr. Friedman is not objected to, going over to Page 80.

Page 89 is a question towards the—above the middle of the page: "You went down to Florida in March for a weekend; is that correct?" I have no objection to reading from there down to the bottom of page 89.

[39] THE COURT: Gentlemen, my only problem is that apparently in order—the manner in which you wish to present this, you wish to present this next to the jury. I have to rule on this at this time. I wish counsel had advised me of this prior to the time and that's the reason I wanted a conference last week, to get this matter straightened out before so that we wouldn't have interruptions with the jury trial.

MR. SLOMSKY: If your Honor please, may I just be heard on my position with respect to this Grand Jury testimony?

THE COURT: Yes.

MR. SLOMSKY: The Grand Jury testimony, it must be remembered, is immunized testimony, testimony that was compelled pursuant to a Court Order.

THE COURT: You can bring that out in the evidence.

MR. SLOMSKY: It's not something I want to bring out in evidence, but under the case United States versus Hockenberry, which I think the Court is familiar. The Government can only introduce Grand Jury [40] testimony to establish the corpus delicti of the offense. I have agreed to go beyond that because I want certain testimony in and Mr. Madden agrees that certain testimony can go in. For Mr. Madden to go beyond that and for the Court to say that other testimony, which I object to, can go in, which will be used against Mr. Apfelbaum, in the arguments of counsel and the jury hearing this, would be a violation of Hockenberry.

This is a fundamental disagreement with Mr. Madden and I.

THE COURT: I think your position is correct about that, but on the other hand, the immunity, of course, doesn't apply to perjury, as we all know, or to false declarations under which he's presently charged and testimony that he gives can be used against him for that purpose.

Now I am not sure that that means that it will be strictly limited to these questions and answers for which he is charged with giving false, making false statements.

What's your position?

MR. MADDEN: Your Honor, if I may, [41] Hockenberry involved an immunized witness who came in before the Grand Jury. While immunized before the Grand Jury he testified truthfully, in part. The part that he testified truthfully to was in forging certain affidavits and complaints that were made under oath. Now he was later indicted for perjury on an unrelated incident and when he attempted to testify in his own behalf at trial the Government, in order to impeach his credibility, used his truthful admissions of wrongdoing.

Now I think the Court says exactly what they were considering here in Hockenberry in the first paragraph. They said we must decide whether the trial judge committed error in admitting into evidence, against the accused, at his perjury trial, a truthful statement he had made to the Grand Jury on the same occasion as the alleged false statement, but unrelated to it.

They go on to say, your Honor, that there is three elements that have to be found:

Number one, the statement made to the [42] Grand Jury was parallel with the privilege under the Fifth Amendment.

Now much of this testimony, your Honor, the Government contends is false. Much of the testimony that Mr. Slomsky wishes to keep out is false testimony. This false testimony should be allowed in and the Government should be allowed to show its falsity, number one, to show that Mr. Apfelbaum had a pattern or design of deceit and denials in the Grand Jury. Number two, that they show under 404B, specifically admissible as to show a pattern of deceit; that they're relevant to show his motive, his motive for lying. Much of them refer back to whether or not—

THE COURT: The problem with that is, I would agree, of course, that normally you can do that under the rules of evidence, but they do not apply to situations where a person is being compelled to testify.

MR. MADDEN: Your Honor, he's being compelled to testify. Cases have held that the protection against self-incrimination does not justify perjury.

THE COURT: Of course.

[43] MR. MADDEN: Nothing Mr. Apfelbaum says can be used against him except in a prosecution for perjury and when the Government comes forward with statements that he made that are false, in that Grand Jury, he is in no way protected by that immunity grant from those false statements and most of the information that Mr. Slomsky is concerned with relates to what the Government considers false testimony in the Grand Jury, perjured testimony.

MR. SLOMSKY: May I respond?

THE COURT: Yes.

MR. SLOMSKY: Mr. Apfelbaum is charged with two specific instances of lying to the Grand Jury.

Now the Government says "Well, he may have lied in four other instances. We want to introduce the balance of the Grand Jury testimony and use it against him to prove other false declarations." He's not charged with other false declarations. That's immunized testimony which cannot be used against him except in those prosecutions may be false declarations with which he's not [44] charged; but to bring it in this case would be doing exactly what is prohibited by Hockenberry, using the balance of the compelled statements against the defendant to prove something, to prove other wrongdoing, with which he is not charged, and that's where the violation of Hockenberry comes in.

MR. MADDEN: Your Honor, I cannot agree that we have a violation of Hockenberry because of the very fact that Mr. Apfelbaum, whether immunized, whether declaring his right against self-incrimination or even being warned of his right against self-incrimination has no right to lie before the Grand Jury or commit perjury.

THE COURT: I agree that, of course, is perfectly correct and true, but I think what defense counsel is saying, in effect, all right, if he committed other acts of false swearing he could have been charged with those other acts of false swearing. Not having been charged

with that, it's not appropriate to show other acts of false swearing as evidence that these two things were false swearing.

[45] Now the problem I see with that is it seems to me when we go to the question of whether he knowingly lied or not, perhaps you can, seems to me you ought to be able to show other instances of false statements that may have been made before the Grand Jury.

MR. SLOMSKY: Well, if your Honor please, the real question is did he knowingly lie with respect to these two particular instances.

THE COURT: Correct.

MR. SLOMSKY: The question is not whether or not in telling the Grand Jury that—I say this figuratively—I didn't beat my wife or I did other things like that or I met Harry Brown in a strange place one day or something like that. The question is not whether or not he knowingly lied in most situations. That's what the Government wants to bootstrap with.

My client is charged with a very specific offense and this is immunized testimony which cannot be loosely used against him in this prosecution and if the Government wished to indict him for lying in [46] other instances they had opportunities to do it and didn't do it; and the danger is that, as is always a danger, not only will the Government use, they may just use answers against him because of the way he said it or something, but also use it because Mr. Madden wants to argue "Look, here's a $10,000.00 loan" and "Look what he told the Grand Jury" when he's just not charged with that and it's just unfair to permit it.

MR. MADDEN: These false statements that we are alleging are not unrelated to the charges in the indictment. They refer directly back to the charges in the indictment.

Your Honor, I would refer the Court to United States versus Sweig, 441 Fed. 2nd, 114, which is a Second Circuit case, 1971, where prosecution for perjury the Government was allowed to introduce other false testimony of the accused to show knowledge that he was making false statements.

Your Honor, in addition I have a case that was decided after, Tramaunti, which is 500 Fed. 2nd, 1334, Second Circuit, 1974. [47] That discusses Hockenberry and discusses where Hockenberry fits at, and that is if statements were truthful statements and admissions of guilt they cannot come in. If they are false statements they can.

MR. SLOMSKY: Well, your Honor would have to hold another mini trial to determine whether or not the statements that the Government wants in are false. How else can you make that decision?

THE COURT: I don't think that's a matter for me to determine.

MR. SLOMSKY: Well, I don't want to beg the question. I think my position is clear. There are portions of the Grand Jury testimony which would damage Mr. Apfelbaum in the eyes of the jury. They're compelled statements and they can't be loosely read to the jury by the Government.

MR. MADDEN: Your Honor, I don't believe there are any such statements that are compelled truthful statements that are damaging to Mr. Apfelbaum.

MR. SLOMSKY: Why read them?

MR. MADDEN: Truthful statements.

[48] THE COURT: All right. The objection is overruled and to the extent that these, that the Grand Jury testimony is properly identified, those portions that have been offered in G-1 and G-2 will be received into evidence.

MR. SLOMSKY: Thank you very much, your Honor.

MR. MADDEN: The next witness the Government would like to call will be Katherine Black.

THE COURT: Are you ready to proceed before the jury?

MR. SLOMSKY: My recollection—some of those questions I don't know if I had an opportunity to read it, uses words like loan-sharking, robbery, et cetera, and that was really my concern. You run into the same danger that you run into, as if the Grand Jury testified in the presence of the jury.

THE COURT: I don't know. I didn't see any of those.

MR. MADDEN: I thought we took them all out. I didn't notice any, quite frankly. I agree I went through them rather hastily, but [49] as a matter of fact—

MR. SLOMSKY: Page 28 of G-1, very last question.

MR. MADDEN: I believe they're all out. I may be wrong.

THE COURT: I saw nothing there of that nature or type of thing and that's one reason I ruled the way I did; that it seemed to me that many of these questions and answers simply go along with and are consistent with statements that are made, that are alleged to be the actual false statements.

Ask the jury to come in, please. I don't believe there are any there of that nature, Mr. Slomsky. I may be incorrect.

(At this time the jury enters the courtroom.)

THE COURT: Members of the jury, I am sorry about the delay, but there were certain matters that we could not determine until after the jury had been selected and had to be determined outside of your presence.

MR. MADDEN: Your Honor, before I call my next witness I would request to read a stipulator to the jury.

[50] THE COURT: All right.

Let me point out again, although this was mentioned in opening argument, a stipulation is an agreement between the two attorneys as to certain facts and to the extent that there is such a stipulation you may consider it as you would any other evidence. It is evidence in the case and you may consider it as a fact or established facts.

MR. MADDEN: Thank you, your Honor.

It is hereby stipulated and agreed by counsel for the United States and by counsel for the defendant, with the expressed consent of the defendant Stanley Apfelbaum: One, if called to testify, the clerk of the United States District Court for the Eastern District of Pennsylvania would testify that the Federal Grand Jury, sitting in Philadelphia, Pennsylvania, on December 13, 1976 and

January 3, 1977, before which the defendant Stanley Apfelbaum appeared, was duly impaneled, and that a quorum was present on those dates.

Number two, if called to testify the deputy forelady of the Grand Jury would testify that on December 13, 1976, she placed [51] the defendant Stanley Apfelbaum under oath.

Three, if called to testify the foreman of the Grand Jury would testify that on January 3, 1977, he placed the defendant Stanley Apfelbaum under oath.

Four, if called to testify, Katherine Black, a court reporter, would testify that the transcripts of the defendant Stanley Apfelbaum's Grand Jury appearances are a full and accurate representation of what was said before the Grand Jury.

THE COURT: All right. I would suggest that stipulation be marked for identification as G-3.

MR. MADDEN: I have so marked it.

THE COURT: All right.

MR. MADDEN: The Government would like to call Katherine Black to the stand, please.

KATHERINE BLACK, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MADDEN:

Q. Mrs. Black, by whom are you employed?
A. Knipes-Cohen Associates.
[52] Q. And what is your position with Knipes-Cohen?
A. Court reporter.
Q. And directing your attention to December 13, 1975, were you assigned a specific job?
A. Yes, I was.
Q. What was that job?
A. Court reporter to the Grand Jury.
Q. And will you please explain a little bit to the jury what a court reporter does?
A. We take the testimony of witnesses who are scheduled to testify at the Grand Jury.

Q. How did you take that testimony?
A. By stenotype machine.
Q. Then do you have that testimony transcribed?
A. Yes, I do.
Q. Have you had an opportunity to review the testimony of Mr. Apfelbaum before the Grand Jury?
A. Yes, I have.
Q. And did that transcript adequately and accurately reflect what was said in the Grand Jury?
A. Yes, it did.

MR. MADDEN: At this time may I approach the witness, please?

THE COURT: Yes.

MR. MADDEN: Your Honor, I would request [53] permission to give copies of Government Exhibit G-1 to the jurors.

MR. SLOMSKY: I think the witness ought to identify G-1 first.

THE COURT: I think that is correct.

BY MR. MADDEN:

Q. Would you look at Government Exhibit G-1, please?
A. Yes.
Q. Can you identify what it is?
A. It's the transcript of Mr. Apfelbaum's testimony before the Grand Jury.
Q. And that is not a complete transcript, is it?
A. No, it's not.
Q. Are portions deleted?
A. Yes, they are.

MR. MADDEN: Your Honor, at this time I would request permission to give—I believe we have marked that Government Exhibit G-1. However, your Honor, I will mark another one. I believe the Court has that copy.

THE COURT: Yes. You should have another one marked as G-1.

May I see that for just a moment, [54] please?

All right. You wish to cross examine as to this?

MR. SLOMSKY: No, your Honor.

THE COURT: G-1. You asked leave that it be shown

to the jurors, did you not? You offered G-1 into evidence?

MR. MADDEN: Yes, your Honor.

THE COURT: G-1 will be received subject to my prior ruling.

(At this time G-1 is received into evidence.)

MR. MADDEN: I would ask the Agent be permitted to pass out copies of G-1 to the jury.

THE COURT: Permission will be granted to do so.

MR. MADDEN: Thank you, your Honor.

Your Honor, I imagine we should have a short sidebar.

(The following takes place at sidebar in the presence of but out of the hearing of the jury.)

MR. MADDEN: Your Honor, Miss Black, through agreement between Mr. Slomsky and I, [55] is going to read the answers and I will read the questions so that the jury can better understand it, but I wanted—I would like you to—either myself or your Honor to explain her function.

MR. SLOMSKY: Judge, with all due respect to Mr. Madden, I have agreed to more things than in my recollection.

I would like her to read the questions and answers. I don't want the danger of some intimation or something. Let the witness read the questions and answers. She took it down.

MR. MADDEN: I think it would be easier for the jury to understand if I was permitted to read the questions and another party being the answering party.

MR. SLOMSKY: They have the transcript in front of them.

I might say, for the record, that pink line on the right-hand side of the page is not on the copies given to the jurors.

THE COURT: That's correct. That's my understanding. That's the reason I wanted to look at it, verify that was true.

[56] MR. SLOMSKY: I have no objection if the judge's law clerk wished to read the question and the witness read the answer.

(End of sidebar discussion.)

THE COURT: Ladies and gentlemen, so that you will be able to better follow the matter, we are going to have the questions and answers now read to you in the record, although you have the transcripts there before you, my law clerk, who is a neutral party, shall we say, in this matter, no way involved as an adversary, will read the questions. The witness who is on the witness stand will read the answers. That way we think you will be also to better follow it.

(The following questions are read by Howard Finkelstein and the answers are read by the witness Katherine Black.)

"Question: Now, sir you know Harry Brown; is that right?

"Answer: Yes, sir.

"Question: How long have you known Harry Brown?

"Answer: The City bought the first Lincoln for Mr. Fitzpatrick before he came [57] into office. They presented it to him January 7th, the day he took office. We did not buy the Lincoln as a lot of people think. It was given to him by either Richard Sprague or Eugene Alessandroni, who had my job at that time. They bought the car. It came through the City. It was purchased on low bid, I imagine.

"Question: How long have you known Harry Brown?

"Answer: Only since I was taking the car to be serviced.

"Question: When was that?

"Answer: After 1974. The first 12,000 miles, I have to service the car by the agency, It was done free. After that, I take the car to 2nd and Hunting Park Avenue where the City does it.

"Question: Now, the first time that you met Harry Brown was in 1974; is that correct?

"Answer: That's correct to the best of my ability, yes. I met him when I had to take the car to be serviced.

"Question: Do you have any recollection [58] of meeting him prior to 1974?

"Answer: No. If I did, I didn't know who he was.

"Question: Now, when was the first time you met Marvin Greenblatt?

"Answer: Same thing. I never knew him before either until I had to take the car to be serviced.

"Question: Now, did you—did you or Mr. Fitzpatrick ever lend any money to Harry Brown or Marvin Greenblatt?

"Answer: No way, sir.

"Question: Did you ever tell anyone that you had lent any money to Harry Brown or Marvin Greenblatt?

"Answer: No, sir.

"Question: Did you ever tell anyone that you had been involved in a loan to Harry Brown or Marvin Greenblatt?

"Answer: No, sir.

"Question: You never told anyone that you had been involved in any kind of loan to Harry Brown?

"Answer: No.

"Question: And you never—

[59] "Answer: I never, I never lent him any money. As far as I know, Mr. Fitzpatrick never lent him any money. Mr. Fitzpatrick has his own problems. I don't think he could lend him any money.

"Question: Sir, when was the last time you saw Harry Brown?

"Answer: Last January. I'm trying to think. Last—either last—let me see. Last December or January, I'm not sure. I'm not sure of the exact date.

"Question: And where did you see him?

"Answer: In Florida.

"Question: And where in Florida?

"Answer: Where he resides.

"Question: Where is that?

"Answer: Somewhere in Fort Lauderdale, on the outskirts of Fort Lauderdale.

"Question: Were you there on official business?

"Answer: No. I was there on a vacation. I knew he

was down there and I stopped to see him. It was his anniversary and I even brought over $35.00 worth of delicatessen because I felt sorry for him. Because I knew him from [60] before, he had a broken leg and I used to bring food to his house when he had a broken leg.

"Question: What did you say to him and what did he say to you when you saw him at that time?

"Answer: We just kissed and embraced, not a kiss like, you know, a man and woman. We just hugged each other because we hadn't seen each other for a long time and he knows what I done for him when he was sick laying on his back. I used to bring him food and that's about it.

"Question: Did you lend $10,000 to Harry Brown?

"Answer: No way. I have my own problems.

"Question: Did you ever tell anyone that you lent $10,000 to Harry Brown?

"Answer: No.

"Question: Sir, where do you have bank accounts?

"Answer: I.V.B.

"Question: And do you have a checking account there?

"Answer: Yes, I do.

"Question: And do you have a savings [61] account there?

"Answer: It's not a savings—it's called Snap Savings. It's part of my checking account. They take a dollar a week—a dollar a month out for me and I have one set up for my son who's fourteen years only. It's in my name in trust to Joel A. Apfelbaum and I think each month they take a dollar out of the checking account.

"Question: Do you have any other accounts?

"Answer: Yes, I do, sir. I have three accounts there. I have a commercial loan for 3,500. I have a time savings loan which was—it was a commercial loan converted into a time savings. That was for 5,500. I don't know how much I owe on that. And then, I also have what they call an Executive Credit. I asked for an American Express card and Mr. Orem, who—by the way, Harry Brown introduced me to Mr. Orem. That's how I knew about the bank. That was the connection with the bank. That's how I knew.

At that time, I was in trouble with the finance companies and they helped me get out of it. Finance companies are the worst.

"Question: What finance companies were [62] you in trouble with?

"Answer: Household Finance and Greater Finance.

"Question: And where did you have your accounts?

"Answer: In Frankford on Frankford Avenue.

"Question: Which particular branch?

"Answer: And, they were dunning me. They kept on calling me at the house and at the work.

"Question: Which particular branch?

"Answer: Household Finance was up on Paul Street, 4600 block of Paul and Greater Finance was, I believe on the 6300 block of Frankford Avenue.

"Question: Did you ever borrow any money from Harry Brown?

"Answer: Yes, one time.

"Question: How much did you borrow?

"Answer: Five hundred dollars and I paid him back in dribs and drabs. I needed money. I'll tell you what it was for. I was behind in my rent, two months behind in my rent and I had a lot of payments, a lot of other [63] payments. This is when the finance companies were after me and I asked him. I was desparate. They were ready to put my family out. I was two months behind on my rent. And, I went around to a lot of people and they didn't have the money. Then, I called him up on the phone. I said 'Can you do me a favor? Can you lend me 500. I need it for rent.' He said 'Sure. Come up and get it.' There was no problem. And, there was no interest charged. In fact, I think I still owe him $40.00 on it. I think I only paid him back $460.00. I may owe him $40.00. I'm not sure, but that was it.

"Question: Now, you never let $10,000 to—

"Answer: I never had 10,000. I got my own problems, Mr. Friedman, believe me. Call I.V.B.—no, you have I.V.B. records. I understand you have the records. You can see that I'm behind three months with them right now too, okay.

"Question: Did you ever tell anyone that you lent $10,000 to Harry Brown?

"Answer: No way, no way. I have no recollection, really.

[64] "Question: You n ver told—you deny it?

"Answer: I don't like to shoot the bull. I like to tell the truth, okay. I don't remember. If I did, I don't remember saying it, really.

"Question: You have no recollection of it?

"Answer: No, none whatsoever and I'm not trying to lie to you, believe me.

"Question: To the best of your recollection, your testimony here today is that you never told anyone that you lent $10,000 to Harry Brown?

"Answer: I never had 10,000 to lend anybody.

"Question: Okay. So, the answer to that is the best of your recollection?

"Answer: Right. To the best of my recollection, no, I didn't say it.

"Question: Now, did you ever tell anyone that the reason why you went down to Florida to see Harry Brown was to get, to try to collect some of the money that Harry Brown owed you?

[65] "Answer: No way.

"Question: No?

"Answer: No. I go to Florida every year and I'll tell you when I go. I go the first two weeks in December because usually that's the best time to go before the price changes. You can get a motel room for like $10.00 a night. After the 15th of the month, it goes up to $50.00 a night. And, I usually go—I either go to Florida or I go to Puerto Rico and you can check any records you want to. That's for the last 13 years, that's what Ive been doing. I never take a summer vacation.

"Question: Did you ever tell anyone that you were trying to contact Harry Brown to get money back from him?

"Answer: To the best of my recollection no.

"Question: Now, you never lent Harry Brown any money; is that right?

"Answer: That's right.

"Question: And, do you have any recollection at all of

ever hearing that Emmett Fitzpatrick had lent any money to Harry Brown?

"Answer: No way at all, sir. I don't [66] know what he does with his own money.

"Question: Now, did you meet with them again another time?

"Answer: On other occasion.

"Question: And when was that?

"Answer: Well, Mr. Brown got into a motorcycle accident and it was a freak accident and he was being towed by somebody else at about forty-five miles an hour and he hold him to slow down and instead of slowing down, the man stopped and he hit and he broke his leg and they had to put a pin in.

If you know Mr. Brown, I think you've seen him before. If you don't know him, he weighs about three hundred and fifty pounds. To see a man like that with his leg up in the air, I really felt sorry for him. I used to bring him fruit to the house and I brought him steaks one time.

"Question: Was Mr. Greenblatt ever there?

"Answer: No.

"Question: Was Mr. Fitzpatrick there?

"Answer: No, sir.

"Question: Did you ever see Mr. Brown or [67] Mr. Greenblatt with Mr. Fitzpatrick again after that robbery?

"Answer: Not to my recollection, no.

"Question: Now, sir did you go down to Florida in December of 1975?

"Answer: I think I went twice.

"Question: When were the two occasions?

"Answer: The first time—I'm not sure. The first time, I am sure because I went to Florida for about three or four days and then I went to Puerto Rico which I like to go also, which is also very reasonable at that time of the year. So, I made a package deal. I went to a travel agency and made a package deal from Fort Lauderdale, I was supposed to look at some boats for a friend of mine.

"Question: Who was the friend?

"Answer: My doctor.

"Question: Who is that, Dr. Slawek?

"Answer: Dr. Slawek, yes. Okay. I was supposed to look at a boat for him down at Fort Lauderdale at Pier 66 where they have a lot of boats and from there, I took off and went to Puerto Rico for about ten days and then, I came home and I'm not sure whether I went in [68] late December or early January. The second time I went, it was just for—oh, I borrowed some money off the bank.

"Question: Which bank's that?

"Answer: I.V.B. That's one of the problems.

"Question: Do you have any other accounts in any banks?

"Answer: No, sir.

"Question: Do you have any loans from any bank other than—

"Answer: No, sir. I cleaned them up with the loan from I.V.B. I had bad credit. I don't know, a lot of people have bad credit. I had bad credit. They consider me a number nine, which was the worst and I wanted to clean it up and I explained that to Mr. Orem. So, he said he couldn't give it to me either. I said 'Can you grant me a commercial loan till I clean it up,' and he did. And then, I cleaned it up and I converted that loan to a—

"Question: Where did you have loans?

"Answer: I told you.

"Question: Before you cleaned them up, just those two, Household Finance and where [69] else?

"Answer: And Greater Finance.

"Question: Those were the only two?

"Answer: Well, they were the two big ones.

"Question: Where else did you have loans?

"Answer: Oh, a bank down here. It wasn't that big of a loan. I still owe them $73.00 from about three years. They kept the Better Business Bureau, not the Better Business Bureau; the Credit Bureau, what do you call it? They gave me a number nine. Then, when I went to repay them the $73.00 they said 'We wiped it out a long time ago.'

I said 'Yeah, you wiped it out of here, but you never wiped it out with the Credit Bureau.' So they did.

"Question: Has Emmett Fitzpatrick ever co-signed a loan for you?

"Answer: No.

"Question: Has Emmett Fitzpatrick ever co-signed any loans that you were involved in?

"Answer: No, sir.

"Question: Now—

[70] "Answer: They were all on my own, myself and my wife.

"Question: Have you lent anyone any money in the last three years, have you lent anyone any money?

"Answer: When you say 'in the last three years', what kind of money and to who, Mr. Friedman? Be more specific. Yes, to my office, to my secretaries when then needed money, I lent them money. To Mr. Fitzpatrick, the day before payday, either he would lend me $5.00 or I would lend him $5.00. If that's what you mean, yes.

"Question: In the last three years, have you lent anyone over $3,000?

"Answer: No, sir. I didn't have over $3,000 to lend.

"Question: In the last—all right, have you ever told anyone that in the last three years you've lent anyone over $3,000?

"Answer: No, sir. I don't remember.

"Question: You don't remember telling anyone that?

"Answer: No.

"Question: You're pretty certain of [71] that; right?

"Answer: I'm almost positive. I don't have the money to lend. I got enough problems of my own.

"Question: Now, sir you said you were down to Florida on two occasions, once in December of '75?

"Answer: Uh-huh.

"Question: When was the next occasion?

"Answer: I think either the end of December or the beginning of January. Now since then, I've been down there three more times. I have a friend that has a fishing boat that takes me fishing.

"Question: All right. Now, were you also there in March, 1976?

"Answer: I think it was March of '76, I believe so.

"Question: Now, who did you go with when you went down there in December of 1975?

"Answer: The first time I went by myself.

"Question: In December of '75?

"Answer: That's right.

"Question: And in March of '76, who did [72] you go with?

"Answer: I went with a couple of people that own a vending business.

"Question: Who are they?

"Answer: Oh, one guy, he doesn't own it. He works for Stan Harris; Harvey Fisher and Ike—what's Ike's last name. He owns Have-A-Vend. They're friends of mine.

"Question: And who paid for your way in December of 1975?

"Answer: I paid for my way. I borrowed from the bank. I paid for my way all the way.

"Question: Who paid for your way in March, 1976?

"Answer: I paid for my way.

"Question: Now, in December of '75, did you contact Harry Brown?

"Answer: I think—the first time I was down there, I didn't stop to see him. The second time, I stopped to see him.

"Question: Is that March of '76?

"Answer: No, no, no. March of '76, I didn't stop to see him. The second date—now, you have to bear with me. The second date was either the end of December or the beginning of [73] January. In March, '76, I went fishing. I never saw Mr. Brown then. Then, the April and May, I went—March, April and May, I went on weekends.

"Question: How'd you go, by plane?

"Answer: By plane, night flight which is cheaper to go than day flight. If you go after ten o'clock, it's $77.00 to go. That's the way I went. I stayed in the room with somebody who paid for it. I paid part of the room. We

went in a group. We went like in a group, eight or nine people. We went on fishing trips for weekends. I went on Thursday night. I left on Thursday night and was back on Monday night. I took vacation days or comp days which were coming to me and I didn't go at the City's expense, so in case anybody has that idea. I paid my own way for every trip that I ever took. Nobody ever paid my way for me and each time I borrowed money from the bank to go. That's where I paid for it. If you don't believe me, you got my bank records. They'll show you.

"Question: All right. Now, when you stayed at the Pier 66, that is when you went down to look at the boats; right?

[74] "Answer: Yes, sir.

"Question: On that occasion, when was that, December, '75?

"Answer: That was December 5th. I remember that date, because I was trying to beat the price change. I wanted to go to Florida and to Puerto Rico. In fact, Dr. Slawek was supposed to come down to meet me but he couldn't get away. So, I stayed down there for three or four days for nothing and I just saw a lot of boats but I had no right to buy a boat for him. He had to buy his own boat. I was looking to, for something—he said—he sent me down first. He said 'You go down first; look around. If you see something, let me know.' I said 'I saw a few boats.' He was supposed to come down but he never did. So, I had a package deal already made by a travel agency to take me from Florida to Puerto Rico and back here to Philadelphia by myself.

"Question: All right. Well, in December of 1975, which was this time you went down to Fort Lauderdale, you went and stayed at Pier 66.

"Answer: That's right.

[75] "Question: Was the purpose of your going down there to try and make contact with Harry Brown?

"Answer: No, sir.

"Question: Was that one of the purposes for going down there?

"Answer: No, the purpose was to go down and look at boats.

"Question: Did you ever tell anyone that one of your purposes for going down there was to make contact with Harry Brown?

"Answer: I don't know where you're getting the information. I don't remember telling anybody that.

"Question: So, to the best of your recollection, you never did tell anyone that; is that correct?

"Answer: That's right.

"Question: Now, were you social friends with Harry Brown and—

"Answer: What do you mean by 'social friends'?

"Question: Well, did you go to parties with them?

"Answer: Some parties.

[76] "Question: In December of 1975, did you borrow $5,000 from I.V.B.?

"Answer: December of '75?

Question: Uh-huh?

"Answer: No, sir. I borrowed 5,000 before December of '75. Take a look at my records there. What they may have done is converted the commercial note over and over again. See, a commercial note only runs for thirty or sixty days and then they re-do it again.

"Question: Did you file a loan application in December of 1975 for a $5,000 loan?

"Answer: December, '75?

"Question: Yes?

"Answer: I would have to see the papers.

"MR. FRIEDMAN: I ask that this be marked Grand Jury Exhibit Number 1.

"(Whereupon a copy of a loan application dated 12/3/75 was marked as Grand Jury Exhibit Number 1 for identification.)

"BY MR. FRIEDMAN:

"Question: Let the record reflect that [77] I've marked a copy of a loan application dated 12/3/75 as Grand Jury Exhibit Number 1 for today and I'm handing it to Mr. Apfelbaum.

"Answer: This is before I went to Puerto Rico, sure. But, wait a minute. This is the first loan. I'm trying to figure, is this the—yeah, this is the six month commercial loan. But, will you please check the records? I think this could be the first one. I'm not sure. This is before I went to Puerto Rico.

"Question: Well, you got that money; is that right?

"Answer: I don't know whether I got this money or this was a conversion of my—no, this is the six month—yeah, I got the money.

Question: And what did you do with it?

"Answer: Paid off my loans.

"Question: And you paid off loans where?

"Answer: I told you where, at Greater Finance and Household Finance.

"Question: Did you have any money left after you paid off those loans?

"Answer: Yeah and I bought some clothes and went away on vacation.

[78] "Question: Where did you buy the clothes?

"Answer: Wanamaker's.

"Question: How much clothes did you buy?

"Answer: Not much.

"Question: And that was all you had left? How much did you have left after you paid off your loans?

"Answer: Do you have a copy of my checking account there?

"Question: I'm asking you how much you had left.

"Answer: Well, if you look at my checking account, you will see that almost the whole 5,000 went out to everything.

"Question: You're saying the 5,000 was put into your checking account?

"Answer: That's right. I did not get the 5,000 cash. The way they do it, they take your checking account and deposit the money into it. They give you a credit or a debit. What is it, a debit or a credit? I forget. My accounting is lost for years now. They give you a credit. They give you the $5,000 credit [79] and you can write checks on it. That's how they give you that loan and

they charge you a monthly interest on it and then after the monthly interest, after the six months, I had that loan converted to a regular loan.

"Question: Were you close friends with Harry Brown?

"Answer: No.

"Question: Did you ever tell anyone that you were close friends with Harry Brown?

"Answer: No.

"Question: Did you ever discuss with Emmett Fitzpatrick his lending any money to Harry Brown?

"Answer: No, sir:

"Question: Did Emmett Fitzpatrick ever tell you that he had lent money to Harry Brown?

"Answer: No, sir.

"Question: Did Harry Brown ever tell you that Emmett Fitzpatrick had lent him any money?

"Answer: No, sir.

"Question: Did Harry Brown ever tell you that Emmett Fitzpatrick had arranged for Harry Brown to be lent any money?

[80] "Answer: No.

"Question: Did you make any arrangements to have Harry Brown lent any money?

"Answer: Me make arrangements for Harry Brown?

"Question: Yes.

"Answer: No, sir. He made arrangements for me.

"Question: For you to get five hundred dollars?

"Answer: Yes. That and he introduced me to Mr. Orem at the bank to get my first loan off him.

"Question: When he introduced you to Mr. Orem, what did he say?

"Answer: He told Mr. Orem who I was and if he can help me out in any way. I told Mr. Orem my problem, that I had the finance companies dunning me and I couldn't make the payments and I was having a tough time.

"Question: Did you ever make any payments on a loan for Harry Brown?

"Answer: No.

"Question: Did you ever carry any money for Harry Brown in order to make any payments [81] on a loan?
"Answer: No.
"Question: Did you ever carry any money to Harry Brown?
"Answer: Carry any money to Harry Brown? No.
"Question: Did you ever carry any checks to Harry Brown?
"Answer: No, sir.
"Question: Did you ever tell anyone that you had lent Harry Brown money?
"Answer: No. You asked me that question before and I told you no.
"Question: Now, to your knowledge, Emmett Fitzpatrick did not lend any money to Harry Brown?
"Answer: To my knowledge, he did not. I don't know. Okay.
"Question: Okay.
"Answer: I can't say that he did not. I don't know.
"Question: You never had any discussions with anyone concerning the fact that Emmett Fitzpatrick lent money to Harry Brown?
"Answer: No. That's correct.
[82] "Question: All right. So, you were not a close friend and associate of Harry Brown?
"Answer: No, sir.
"Question: Is that right?
"Answer: That's exactly what I tried to tell you.
"Question: And, you have not told anyone that you were or are a close friend and associate of Harry Brown?
"Answer: No, sir.
"Question: Is that right?
"Answer: That's right.
"Question: Now, let's go back to your trip to Florida. You go down to fish on the weekends; is that correct?
"Answer: That's right, sir.
"Question: And, once a year, you usually go down for two weeks—
"Answer: For two weeks usually—

"Question: —broken up between Florida and Puerto Rico.
"Answer: And Puerto Rico. It all depends on how much money I have in December, or if I can borrow money from a bank, like I did.
[83] "Question: It's my understanding you went down to Florida in December of 1975, approximately the 5th of December.
"Answer: That's right. That's what I said before.
"Question: Now, at that time did you see Mr. Brown?
"Answer: No. I told you I went down there for a fishing trip, not fishing trip, to look at a boat for Dr. Slawek and then go to Puerto Rico.
"Question: And you only stayed in Florida about three days?
"Answer: About three or four days, something like that. I'm not sure exactly. Don't hold me to three or four. It was around that. I spent a total time of about two weeks between the two, including flight time and so on.
"Question: When you were down there, did you call up Harry Brown to talk to him?
"Answer: No.
"Question: Did you know he was down there?
"Answer: I heard he was down there. [84] Somebody had said he was down there.
"Question: Did you do anything to attempt to contact Mr. Brown when you were down there?
"Answer: Not that I remember. I don't think I knew where he was at.
"Question: Well, how did you find out where he was at eventually?
"Answer: Somebody had told me about it and I don't know who, but they told me he was down in Florida.
"Question: Okay. By this time, had the papers reported that Harry Brown was missing?
"Answer: I don't believe so. I don't know. I'm not sure. I'm trying to recollect. I don't know whether they said he was missing or not.
"Question: So, in December, when you were down

there, you're sure you didn't try to contact Harry Brown; is that correct?

"Answer: Yeah, yeah.

"Question: Did you try to locate Harry Brown when you were down there?

"Answer: No.

"Question: You're sure?

"Answer: Positive.

[85] "Question: Now, did you tell anyone that you were trying to locate Harry Brown in Florida?

"Answer: Not that I remember.

"Question: And, you know, you were on your vacation and you were looking at the boats, so, you weren't running around trying to find somebody you didn't know where they were; is that correct?

"Answer: Yeah.

"Question: And you would remember that?

"Answer: Yeah, I think I would.

"Question: Okay. Now, the second time you went down to Florida was when, the next time you went down after December?

"Answer: I don't know. It's still very vague in my mind.

"Question: Did you go down in March of '76 for a weekend?

"Answer: I could have, yes.

"Question: Was it around this time that you contacted Harry Brown?

"Answer: If I only knew the date of his anniversary, I know I was there the day before his anniversary.

[86] "Question: What anniversary, his wedding anniversary?

"Answer: His wedding anniversary.

"Question: Did you know it at the time?

"Answer: No, he told me about it.

"Question: So, you're down in Florida for the weekend—

"Answer: Yeah.

"Question: —for your dying passion, fishing; is that correct?

"Answer: No, it wasn't for fishing that time. It was

for rest. I didn't go fishing that weekend. I played tennis that weekend.

"Question: You played tennis?

"Answer: Yeah and then went swimming.

"Question: Where did you stay?

"Answer: Some motel on Motel Row.

"Question: Where?

"Answer: Miami Beach.

"Question: Miami Beach?

"Answer: That's right.

"Question: Okay. So, you went down to Miami Beach. When did you leave, Friday night?

"Answer: I don't know exactly what night I left. I could have left either Thursday night [87] and arrived Friday morning. I took a night flight, like I always do. It's cheaper that way.

"Question: How come you went down to Miami to rest for the weekend?

"Answer: How come?

"Question: Yeah?

"Answer: Because it's cheap that time, that's why. Okay.

"Question: That seems like it's pretty far to go to rest for the weekend.

"Answer: It's nice and warm down there in March. It's cold up here. I've been doing that for thirteen years, Mr. Madden. This isn't the first year.

"Question: So, when you were down there to rest, you happened to see Harry Brown. Did you run into him?

"Answer: No. Somebody told me where he was at.

"Question: Who told you?

"Answer: I'm trying to figure out who told me. I don't know who.

"Question: Now, so you just happened—you were down there for the weekend and what [88] did you do? Did you call him up?

"Answer: Yeah, I called him up. I called where he was working and that's where I called him and I said 'I come 1,400 miles and, you know, I want to see you. I haven't seen you for a while.'

"Question: Did you go to Fort Lauderdale?
"Answer: No, he wasn't in Fort Lauderdale.
"Question: North Miami?
"Answer: No, he was in a place called Family Auto Sales.
"Question: Where is that located?
"Answer: It's in Miami. It wasn't too far from where I was at. I went over the Causeway and over 27th Street. It's a place called not Boca Raton, but something that sounds like that. It's a big used car dealer lot and he was very happy to see me. That's where he embraced me and we talked a lot and he invited me over the house the next day. In fact, the next day, I only wanted to go over there for about five or ten minutes and I said 'Look, I want to see Jane and the kids. We [89] haven't seen them for a long time.' And, I went over in my bathing suit and I stayed the whole day until nine o'clock at night. They wouldn't let me go.
"Question: You were down there for the weekend; is that correct?
"Answer: That's right.
"Question: And, you said it was just a little ways to Mr. Brown's place of employment?
"Answer: That's right, sir.
"Question: Now, how far was it from Mr. Brown's house?
"Answer: Quite a distance.
"Question: Well, you're down there for the weekend to relax because it's warm and you go up and you spend a whole day in Mr. Brown's airconditioned house.
"Answer: He invited us over. Okay.
"Question: When you were down there in March, was that the first time you had seen Mr. Brown or attempted to see Mr. Brown?
"Answer: Yes, sir.
"Question: Attempted to see Mr. Brown?
"Answer: Yes, sir; to the best of my recollection, yes, sir.
[90] "Question: Now, at that time, did you discuss Chestnut Hill at all?
"Answer: No, sir.

"Question: Now, did you ever tell—I believe this was gone into very thoroughly but I just want to clarify in my own mind. Did you ever tell anyone that you lent Harry Brown $10,000?
"Answer: I told you no, sir.
"Question: Did you ever tell anyone that you arranged for a loan of $10,000?
"Answer: No, sir. I couldn't arrange for a loan.
"Question: Did you ever tell anyone that you cosigned for a loan for Harry Brown?
"Answer: I couldn't co-sign because I am judgment-proof. You as a lawyer know it.
"Question: Did you ever tell anyone that?
"Answer: No. How could I tell it if I didn't do it.
"Question: Did you ever tell anyone—
"Answer: As far as I know, I didn't tell. Okay. I answered that four times already.
"Question: Well, each one's a little different question.
[91] "Answer: No. Each time, you get me more excited is what you're trying to do, sir. And, it's not fair. I'm trying to be honest with you and you're not letting me.
"Question: I'm trying.
"Answer: No, you're not, Mr. Madden.
"Question: Well, the record speaks for itself.
"Answer: I know the record speaks for itself."
MR. MADDEN: May I approach the witness, please?
THE COURT: You may.
MR. SLOMSKY: May we take a break?
THE COURT: Take about a ten minute recess, members of the jury.

(At this time a recess is taken.)

(At this time the Court and jury enter the courtroom.)

(At this time Katherine Black resumes the stand.)

MR. MADDEN: At this time I would request the Court's permission to collect copies of Government Exhibit G-1.
THE COURT: All right. G-1 should be [92] returned at this time.

MR. MADDEN: If I may be permitted to approach the witness?

THE COURT: Yes.

BY MR. MADDEN:

Q. Miss Black, I am showing you what has been marked for identification as Government Exhibit G-2. Will you look at that document, please?

A. Yes.

Q. Can you identify that, please?

A. Yes. This was testimony of Mr. Apfelbaum taken at the Grand Jury.

Q. Is that the January 3rd testimony?

A. The caption page and certificate page is not here, so I am unable to tell what day it was.

Q. May I be permitted to show the witness the complete transcript?

Will you stipulate it's January 3rd?

MR. SLOMSKY: Stipulate to exactly what?

MR. MADDEN: The date.

MR. SLOMSKY: I would so stipulate.

THE COURT: It's stipulated G-2 is the transcript of the hearing on January 3rd.

MR. MADDEN: Your Honor, we offer Government Exhibit G-2 in evidence at this time.

[93] THE COURT: G-2 will be received into evidence subject to the ruling that I made in the absence of the jury.

(At this time Exhibit G-2 is received into evidence.)

MR. MADDEN: I would also request the Court's permission to pass out copies of Government Exhibit G-2 to the jurors.

THE COURT: Copies may be handed to the jurors.

MR. MADDEN: I have also handed a copy of Government Exhibit G-2 to Mr. Finkelstein and request the Court's permission to allow Mr. Finkelstein and Mrs. Black to read Government Exhibit G-2.

THE COURT: This will be read and the jury will understand, I am sure, as they did in the prior one, that the questions were questions that were asked during the

Grand Jury proceeding by one of the U.S. Attorneys or assistants and the answers given, as are being read by the witness on the witness stand, are the answers that Mr. Apfelbaum gave at that hearing. All right.

(The following questions are read by [94] Howard Findelstein and the answers are read by the witness Katherine Black.)

"Question: All right. How, did you go to other—did you go to other parties and social events with Harry Brown other than his birthday party?

"Answer: No, sir.

"Question: You're sure you didn't?

"Answer: To the best of my recollection, I didn't.

"Question: Well, do you have any remembrance at all of that?

"Answer: No.

"Question: Did you ever tell anyone that you had gone to numerous social events—

"Answer: No, sir.

"Question: And, to numerous parties—

"Answer: No, sir.

"Question: —with Mr. Brown?

"Answer: No, sir.

"Question: You never did?

"Answer: No, sir.

"Question: Sir, do you remember being questioned by the Federal Bureau of Investigation on March 16, 1976; is that correct?

[95] "Answer: They came to my office, yes.

"Question: Sir, didn't you at that time, tell them that you had been in attendance at numerous parties and general social events together with Harry Brown?

"Answer: No, sir, I don't remember saying that.

"Question: You didn't tell them that, sir?

"Answer: No, sir.

"Question: If you told them that, would that be a lie, sir?

"Answer: Huh? If I what?

"Question: If you told them that, would that be inaccurate?

"Answer: If I told them that?

"Question: Yes.
"Answer: I don't even remember saying that.
"Question: So, to the best of your recollection, you did not tell them that; is that right?
"Answer: Right.
"Question: So, to the best of your recollection, you did not tell them that; is [96] that right?
"Answer: Right.
"Question: Now sir, so the only times really, okay, that you in any way socialized with Harry Brown that you can recall was when you went to his birthday party?
"Answer: It's not really socializing. I was invited to a party like you would be invited to a party. There were other people there and that's all it is. It's not socializing. I don't know what you mean by socializing, Mr. Friedman.
"Question: Sir, were you a close friend of Harry Brown?
"Answer: No, sir. I told you that over and over again.
"Question: Sir, you did tell me that over and over again.
"Answer: That's right, sir.
"Question: Now sir, didn't you in the past tell the F.B.I. that you were a close friend of Harry Brown?
"Answer: If I did, I don't remember.
"Question: Sir, I'm asking you whether you have any memory of telling the F.B.I. that [97] you were a close friend of Harry Brown?
"Answer: No, sir. I don't remember.
"Question: All right. Did you tell them, sir?
"Answer: I don't remember, I said, Mr. Friedman.
"Question: Mr. Apfelbaum, do you have any memory of telling the F.B.I. that you were a close friend of Harry Brown?
"Answer: For the sixth time, I don't remember. Is that explicit enough? I don't remember.
"Question: You don't remember whether or not you said it?
"Answer: No. That's right. I don't remember.

"Question: You don't remember whether you said it?
"Answer: No.
"Question: Will you search your memory, sir, and try to recall when you spoke to the F.B.I.; do you recall that?
"Answer: They came into my office. I don't even remember what I said to them.
"Question: All right. Do you remember [98] about when that you—about when you spoke to them?
"Answer: If you say March, it's March. I don't remember.
"Question: How many people were there, sir?
"Answer: I don't remember.
"Question: How many agents?
"Answer: I think there were two.
"Question: Now sir, there were two agents and were there any other people there?
"Answer: No, sir.
"Question: Now, you had a conversation with them; is that right?
"Answer: I talked to them, yeah.
"Question: You didn't ordinarily—you weren't ordinarily or routinely interviewed by the F.B.I.; is that right?
"Answer: Not that I remember, no.
"Question: Was that an important event that happened?
"Answer: No.
"Question: So, it didn't make any difference?
"Answer: What do you mean 'it didn't [99] make any difference'? I don't understand what you're trying to say.
"Question: Was it an important event that it happened?
"Answer: What, that I talked to an F.B.I. agent? I talked to F.B.I. agents before when I worked in the Courts. They came to me for information. I always gave them information. It's nothing unusual.
"Question: Now sir,—
"Answer: Are they supposed to be somebody other than normal people or what? Are they superior?
"MR. FRIEDMAN: I would ask that this be marked as Grand Jury Exhibit Number 1 for today.

"(Whereupon a hotel record dated December, 1975 from Pier 66 in Xerox form was marked as Grand Jury Exhibit Number 1 for identification.)

"BY MR. FRIEDMAN:

"Question: Mr. Apfelbaum, we have marked as Grand Jury Exhibit Number 1 a Xerox copy of a hotel record from Pier 66; and I would ask you whether your signature appears thereon?

"Answer: Yes. It's mine. I told you I [100] was there.

"Question: Now sir, that's in December. The date is December, 1975; is that correct?

"Answer: Five, that's correct.

"Question: You were down there at that time?

"Answer: Yes, sir.

"Question: Is that right?

"Answer: Yes, sir.

"Question: And, you were down there for the purpose of obtaining a boat for Dr. Slawek; is that correct?

"Answer: I was there on vacation and I was supposed to meet Dr. Slawek down there. We were supposed to look at boats.

"Question: And, did you see him at that time?

"Answer: No, he got busy and he couldn't come down. I called him a couple times. If you have the phone records, you could see that I called his office.

"Question: Did you look for boats then?

"Answer: Yeah, I was looking for boats and I called him a couple times and I told him I would pick him up at the airport. He could [101] stay in my room because my room was paid for. I had a big double room, but he never did come down.

"Question: Did you look for—did you see Mr. Brown at that time?

"Answer: No, sir.

"Question: Did you look for him?

"Answer: No, sir.

"Question: Did you place any calls to look for him?

"Answer: No, sir.

"Question: Why did you stay at Pier 66?

"Answer: Because that's where the booking agent put me into. I didn't want to go there but that's where they put me in. It was closer to where all the boats were. I wanted to get into a place called Stouffer's Inn.

"Question: And, the room number listed on here was room number 463.

"Answer: I don't remember room numbers. If that's what it is, that's what it is.

"Question: Now,—

"Answer: I believe it was $24.00 plus tax I paid for it, each night.

"Question: Now sir, you went down there [102] later and you did contact Mr. Brown; is that right?

"Answer: Yes, sir.

"Question: Where did you stay on that occasion?

"Answer: I stayed in a motel somewhere on Motel Row in Miami.

"Question: Where?

"Answer: Miami Beach.

"Question: What was the name of that?

"Answer: You got me. I usually go down there, if I go into Miami, I go without a room. I usually don't like to get a room but on this one, I booked through a travel agent and that's why they put me in Pier 66, but usually I go down and I look around different motels. I look for the best price and a motel's only just to sleep in, that's all.

"Question: Sir, what motel did you stay in?

"Answer: I don't remember.

"Question: You don't remember?

"Answer: If you can give me a name, I may recollect it.

"Question: You don't have any memory?

[103] "Answer: No, sir.

"Question: Did you pay by check or by cash?

"Answer: I paid cash.

"Question: And, you don't have any memory of where you stayed?

"Answer: I know it was around a hundred and—anywhere between 187th and 192nd Street. Now, which

motel it is, I don't know. There's about twelve of them in between there.

"Question: Can you describe—did it have a swimming pool?

"Answer: Yes, it had two swimming pools. It had a sea water and a regular water. One was warm because that's where I went swimming.

"Question: And,—

"Answer: I remember because the sea water was cold. They can't heat that. The fresh water pool is heated. That's all I can remember of that place. And, I played tennis too while I was down there. They had a free—not free, I think I paid $1.00 an hour. They had a tennis court there and I played with a couple people from New York whose names I do not recollect.

[104] "Question: Was there any particular restaurant or sign that you can recall that was across the street from this particular motel that you stayed in?

"Answer: No, sir.

"Question: No?

"Answer: No. There's so many—there's all stores across the street from it. If you know Miami Beach, the beach part is where all the motels are. The opposite side of Collins Avenue is all stores, like the boardwalk in Atlantic City, if you know what I'm talking about. It's like a honky-tonk.

"Question: All right. And, you did not charge anything at that time; is that right?

"Answer: To the best of my recollection, no. I think I paid cash for everything.

"Question: All right. Now, in connection with that, on that occasion, you did see Mr. Brown; is that right?

"Answer: Yes, I did.

"Question: Where did you see him?

"Answer: At the automobile dealership that he was working at.

"Question: What was the name of it?

[105] "Answer: Some kind of Auto Sales. It's a used car lot. I forget the name of it.

"Question: Now sir, where did you find out his name —how did you find out where he was?

"Answer: I forget. Somebody had told me that they had seen him down there.

"Question: Who told you that?

"Answer: I don't remember. I don't remember.

"Question: Did you tell Mr. Fitzpatrick that you had seen him down there?

"Answer: I don't remember whether I told him or not. I could have. I don't know. I don't remember offhand.

"Question: Now sir, where did you get Mr. Brown's telephone number?

"Answer: I didn't get Mr. Brown's telephone number. Somebody told me the place that he was working and I called up. It was in the book. I don't remember. Some sort of Auto Sales. I don't remember the first name of it.

"Question: Who told you that?

"Answer: I don't remember, sir.

"Question: So, you didn't have any [106] special reason to go down there for any purpose to see Mr. Brown?

"Answer: No, sir.

"Question: And, you never told the F.B.I. or anyone that you went down there to see Mr. Brown for any reason?

"Answer: Not to the best of my recollection, no.

"Question: Because, to your recollection, sir, the only reason you went down there was on vacation and you went down there for no reason to see Harry Brown?

"Answer: No. I usually go down on weekends. I went on a weekend. I left on Thursday night and I think I came back on a Monday night.

"Question: You're telling the Grand Jury here that the reason you went down there was for vacation. You didn't go down there to see Harry Brown and you really never told the F.B.I. that you went down there to see Harry Brown; is that right?

"Answer: Well, you asked me three different things.

"Question: Well,—

[107] "Answer: Can we back off and start from the beginning? See,—

"Question: We'll take one at a time, sir.

"Answer: Yeah, one at a time.

"Question: Now sir, you went down there for personal reasons, for vacation?

"Answer: For vacation, that's right, sir.

"Question: Okay. You did not go down there to see Harry Brown; is that right?

"Answer: That's correct, sir.

"Question: And, you didn't tell the F.B.I. that you went down there to see Harry Brown; is that right?

"Answer: To the best of my recollection, I don't remember telling the F.B.I. anything. I don't know what—

"Question: About going to see Harry Brown?

"Answer: About anything. I don't remember what I told them.

"Question: If you did tell the F.B.I. that you went down there, one of the reasons you went down there was to see Harry Brown, would that have been accurate or not?

"Answer: I don't know. You say 'if'. [108] I don't remember saying anything to them.

"Question: Sir, if you did tell them that, would that have been accurate?

"Answer: What do you mean, if I told them that, would that be accurate?

"Question: Yes, sir.

"Answer: I don't remember saying anything to them.

"Question: Sir, if you told them that, would that be accurate?

"Answer: There is no ifs, ands or buts. If I told them, I don't remember. I just don't remember.

"Question: Well, I'm saying, assuming that you did tell them that, would that be true?

"Answer: I'm not assuming anything, sir.

"Question: Well, I am assuming and—

"Answer: Well, you may be assuming, but I'm not. I don't give sworn testimony on assumptions. I don't think you would either and if you had a client, you wouldn't either.

"Question: Now sir, you went down there and you saw Mr. Harry Brown and where was he when you saw Mr. Harry Brown and where was he when you got there? [109] "Answer: At an automobile dealership. He asked me—he invited me over for lunch.

"Question: Was he sick that that time?

"Answer: Not that I know of. I know he was limping from the accident that he had.

"Question: Did you see him at another occasion right after the accident?

"Answer: I told you I did.

"Question: Where did you see him at that time?

"Answer: At his house. I was on my way up to the hospital to see him. I was told he was in the hospital and he wasn't there. He was home and I went home. I brought him a fruit basket.

"Question: What house—where was that house?

"Answer: Somewhere up near Willow Grove. I don't know the exact address.

"Question: Now, when you got down to Florida, he invited you—

"Answer: He invited me over for lunch.

"Question: For lunch?

"Answer: Right.

"Question: Where did you go with him [110] for lunch?

"Answer: Nowhere. We sat in his—the automobile place because he couldn't move around with his leg and he said he was busy.

"Question: And, what did you have?

"Answer: Coffee.

"Question: That was it?

"Answer: That was it. That was the lunch.

"Question: What did you talk to him about?

"Answer: Just old times, about his foot mostly, how he was getting along and how his wife and the children are. Then he invited me over to his house the next day for a little gettogether because it was his anniversary the next day. He told me his daughter was baking a cake, which she did. And, I brought food over to the house.

"Question: And, who else was there?

"Answer: His wife, two children and a friend of mine.

"Question: And, you stayed for how long?

"Answer: We stayed all day. We were [111] in our bathing suits. We had planned to only stay a couple hours and they didn't want us to leave and I went fishing with the kids in a canal in back of the house. I remember that because the kids liked me a lot.

"Question: Did you discuss any loans with Harry Brown?

"Answer: No, sir.

"Question: Did you ever tell the F.B.I.—you denied last week that you told anyone that you had lent money to Harry Brown?

"Answer: That's right.

"Question: You denied that?

"Answer: How could I lend money when I don't have any money myself, Mr. Friedman?

"Question: So, you didn't tell the F.B.I. or anyone that you had lent money to Harry Brown?

"Answer: No, sir.

"Question: Is that right?

"Answer: That's right.

"Question: Did you tell anyone that he patted you down?

"Answer: No. That's ridiculous. I don't know where you're getting all these [112] statements at. He hugged me but that's about it. He didn't pat me down. He hadn't seen me for quite a while.

"Question: He didn't pat you down to see that you weren't carrying a weapon?

"Answer: That's ridiculous. I don't carry a weapon. Everybody knows I don't carry a weapon.

"Question: He didn't do that; right?

"Answer: No, he didn't do it.

"Question: And, you didn't tell the F.B.I. that he did that; right?

"Answer: Let me ask you something. Can I ask something? In other words,—

"Question: Sir, I would ask you to answer the question. Did you tell the F.B.I.?

"Answer: No, sir. I did not. Okay.

"Question: All right. Now, you personally never did any business with Chestnut Hill; is that right?

"Answer: That's correct, sir.

"Question: And, you personally have never had any financial—excuse me. Other than a $500 loan, you personally never had any financial transactions with Harry Brown; is [113] that right?

"Answer: None whatsoever. He did me a favor and I paid most of it back.

"Question: You never told anyone that you did have financial transactions with—

"Answer: No.

"Question: —with Harry Brown?

"Answer: No, sir.

"Question: Other than that $500 loan?

"Answer: I never told anybody about the $500 loan until I told you. I felt that was a personal thing and nobody should know about it. He did me a personal favor. Otherwise, I would have been thrown out of the house.

"Question: You also testified that you did not co-sign any loan for Harry Brown; is that right?

"Answer: That's correct, sir.

"Question: Because, if you're judgment-proof—

"Answer: Who's going to lend me anything? I owe nothing. No bank in the world is going to let me co-sign and you know that as well as I do.

[114] "Question: So,—

"Answer: I'm not a lawyer. You are.

"Question: So, obviously it would be a preposterous thing to say; right?

"Answer: Absolutely, sir.

"Question: So, you didn't tell the F.B.I. that you had co-signed a loan for Harry Brown?

"Answer: How could I when I couldn't?

"Question: So, you didn't; right?

"Answer: Yeah, right.

"Question: Now, you still have the—Mr. Orem, you were introduced to Mr. Orem by Harry Brown; is that right?

"Answer: That's correct, sir.

"Now, sir, in 19— what, 1975 and 1976, did you have $10,000?

"Answer: Did I what?

"Question: Have $10,000?

"Answer: I told you I didn't have $10,000.

"Question: And, you didn't lend $10,000 to Harry Brown; is that right?

"Answer: No, sir.

"Question: And, you testified that way [115] last week.

"Answer: Yeah.

"Question: You testified last week that you never told anyone that you had lent $10,000 to Harry Brown; is that right?

"Answer: That's right, sir.

"Question: Okay. And, you still persist in that testimony?

"Answer: Uh-huh. How can I lend it to him when I didn't have it? I had to go to the bank and borrow money myself.

"Question: You still persist in that testimony?

"Answer: Yes, sir.

"Question: You never told the F.B.I. that you lent Harry Brown $10,000; is that right?

"Answer: If I did, it was ridiculous.

"Question: Did you tell them that?

"Answer: I don't know. I don't think I did.

"Question: Do you have any recollection of telling them that?

"Answer: No, no, sir.

"BY MR. FRIEDMAN:

[116] "Question: Sir, when you spoke to the F.B.I. in March of 1976, that was right after you had come back from Florida and had spoken to Mr. Brown; is that right?

"Answer: If you say so. I don't remember. I don't remember when it was.

"Question: Wasn't it a few days after you had been to Florida?

"Answer: I don't remember. It could have been.

"Question: Now, how long did you talk to them?

"Answer: I would say no more than about five minutes.

"Question: . . . 1976, did you have—were you in 1976 interviewed by the F.B.I. on any other occasion?

"Answer: Not that I remember, no.

"Question: And, how about during the preceding year, 1975?

"Answer: No.

"Question: When you saw Mr. Harry Brown, you didn't go down there to do any investigation of him; is that right?

"Answer: I didn't go down to see [117] Mr. Harry Brown. I went down for vacation.

"Question: What document did you bring?

"Answer: The only reason I have this is because—I want to correct some statement from before. You said I took a $5,000 loan in December. It wasn't December. That was a renewal of the loan that I took in August. I just—the way I can tell you is the date on this check is August 18, 1975. It's to Household Finance Company for $1,604.45, which I paid off. It says 'Payment in Full on consumer's loan as per agreement with Mr. J. DeSantis, Manager.'

"Question: Could we have this (indicating)?

"Answer: Sure.

"Question: I don't want to mark it on the front.

"Answer: You can mark it. It says 'cancelled check.' It doesn't make any difference.

"MR. FRIEDMAN: We'll mark it on a piece of paper attached to it.

> "(Whereupon a check dated August 18th, 1975 in the amount of $1,604.45 payable to [118] Household Finance Company was marked as Grand Jury Exhibit Number 2 for identification.)

"BY MR. FRIEDMAN:

"Question: This check that you brought in which has been marked Grand Jury Exhibit Number 2 for today—

"Answer: Yeah, okay.

"Question: Do you want to refer to it then?

"Answer: Yeah, I believe I took a $5,000 loan in August of '75. With this, I paid off quite a bit of loans. I told you I had very bad credit. It wasn't bad. It was what they call slow. I was slow paying. I had problems and I took the loan to make like a consumer loan out of all of them. They couldn't give me a consumer loan because of my bad credit, so they granted me what they call a commercial loan for $5,000, which is you take the money and you pay the interest until you can pay the full note back.

"Now, I had told you—you had showed me a paper saying I took it out in December. It wasn't in December. December was a renewal of that note. In December, I got $2,500. [119] Remember I told you executive credit. Well, I think if you have the paper there now, you could see it says $5,000 and $2,500. I couldn't understand why there was $5,000 and $2,500 on there.

"I do recall now that I got executive credit of $2,500 right before I went to Pier 66 because I remember going to the travel service—travel agency and writing out a check for the airline ticket and I picked up my confirmation as to where I was going to stay. Everything else, I paid for. I paid for my airline ticket ahead of time, and I had gotten some traveler's checks that I needed.

"But, that $5,000 loan was not in December. It was in August of '75, because that's why I paid off all my loans, and I had told you that I owed Household Finance Company. It was an error. I would like to correct it now. It was Beneficial Finance Company. Greater Finance Company, I had paid off, I think the year before. I had so many different finance companies. I got them confused. But, it was Beneficial Finance Company. So, I would like to correct the record.

[120] "Question: We appreciate your correcting the record.

"Question: Okay. Now, I would like to go back to one of the questions that Mr. Friedman had asked and that was how you found out that Harry Brown was in Florida or where he was in Florida?

"Answer: I don't remember. I have a lot of friends

that are in Florida and I think one of them came up and told me he was down there.

"Question: What mutual friends do you have with Harry Brown?

"Answer: I don't know. There is no such thing as a mutual friend.

"Question: Well, who do you know that knows Harry?

"Answer: I don't know.

"Question: Well, tell me everyone you know that knows Harry?

"Answer: I don't know. I don't know to this day who told me.

"Question: Well, I'm not asking you who told you right now. I want to know who you have that is a mutual friend of Harry Brown.

[121] "Answer: I don't know offhand right now.

"Question: Did Mr. Fitzpatrick tell you?

"Answer: I don't think so. I don't think he knows either. It was somebody down in Florida told me, not up here.

"Question: Someone in Florida, where did they tell you?

"Answer: They told me he worked at some sort of a used car lot.

"Question: Where did you see him? Let's put it that way.

"Answer: On Collins Avenue, I imagine. I don't know who it was. I saw quite a few people down there. I don't know what their names are. You know, it was so long ago.

"Question: Okay. Let's go back again. The person that you saw who told you where Harry Brown was, where were they at that time? Did they tell you up here or did they tell you in Florida?

"Answer: I think it was down in Florida.

"Question: Okay. And, where did you meet them?

[122] "Answer: I imagine on Collins Avenue somewhere. I don't remember. I don't remember, really.

"Question: Can you tell me what person that you know that knows Harry?

"Answer: Marvin Greenblatt knows him.

"Question: Did you see Marvin Greenblatt in Florida?
"Answer: No.
"Question: Did Marvin Greenblatt tell you?
"Answer: No.
"Question: Who else knows him that knows you?
"Answer: I don't remember who told me. To this day, I don't remember. I truthfully don't remember.
"Question: Well, they just didn't say Harry's in Florida. They must have said Harry's in Florida. He's working at such and such a place and I think you said Family Auto Sales.
"Answer: Is it Family Auto Sales? I know it had something to do with auto sales.
"Question: Okay. So, somebody told you [123] exactly where he was working?
"Answer: Yeah, somebody told me that they saw him there.
"Question: Okay. And, you remembered where they told you they saw him.
"Answer: At this auto sales place, yeah.
"Question: But, you have no idea at all who it could have been?
"Answer: No, no, Mr. Madden, I don't.
"Question: No idea, no conception?
"Answer: No. I don't remember, really.
"Question: Okay.
"Answer: If I did, I would have told you.
"Question: Now again, who else do you know in common that knows Harry Brown?
"Answer: I don't know.
"Question: Well, what friend of yours knows Harry Brown, anybody?
"Answer: I don't know. I don't have that many friends that know Harry Brown. I'm just saying I probably bumped into somebody down there and they said, I think they must have told me a friend of yours is down here. He's working down here.
[124] "Question: And, you have no conception in your mind of who that was that told you?
"Answer: No, sir.

"Question: Was it a male? Was it a female?
"Answer: I couldn't tell you, really. I really couldn't.
"Question: Does Mr. Fitzpatrick know Harry Brown?
"Answer: Does he know him.
"Question: Yes.
"Answer: I believe Mr. Brown was his client.
"Question: Did Mr. Brown ever tell you that Mr. Fitzpatrick was a close friend of his?
"Answer: No. He said he was his lawyer.
"Question: He never said he was a good friend.
"Answer: Not that I know of. He never told me. To the best of my recollection, I don't remember him saying he was a good friend. I know he was a client of his. I know that from reading it in the papers.
"Question: So, you can't tell the Grand Jury how you found out that Harry Brown was in [125] Florida?
"Answer: I don't know. If I did, I would tell you, Mr. Madden.
"Question: And this was in March of 1976; is that correct?
"Answer: I think that was the date that Mr. Friedman gave.
"Question: Now, did you know that Harry Brown was supposedly in hiding at that time? Had there been newspaper reports that he was missing or that the F.B.I was looking for him?
"MR. FRIEDMAN: Excuse me. The response to the last question was he thinks that's the date Mr. Friedman gave.
"I assume that your response in the past has been that you don't recall the exact date?
"THE WITNESS: I don't. You know what I thought it was. I thought it was in December. If you say it's March, it's March. I really don't remember to this day.
"BY MR. FRIEDMAN:
"Question: So, you recall the interview took place sometime between December and early Spring of—December, 1975—
"Answer: You told me March of '76 and [126] I'll go along with that. I don't remember. I really don't remember.

"Question: To your recollection, do you recall the interview being between December of '75 and April of '76?

"Answer: Somewhere around there. I don't know. I don't remember. If you tell me a date, that's the date. I'll go along with whatever you say.

"Question: Well,—

"Answer: I mean, I don't remember. Okay. If that's what you want me to say, if it's between such and such a date, yes, I'll say it.

"Question: No, that isn't what I want you to say.

"Answer: Well, I don't remember. I just don't remember when it was.

"Question: You don't remember when it was?

"Answer: No, sir.

"Question: That's the only way you knew Harry Brown was bringing the car in; is that correct?

"Answer: That's what?

[127] "Question: That's the only way you knew Harry Brown?

"Answer: Yeah, yeah.

"Question: And, through this relationship, when you went down to Florida, you wanted to see Harry Brown?

"Answer: No, I didn't want to see him. I happened to be down there, I told you. See, you're trying to put words in my mouth, Mr. Madden, and I don't think it's fair.

"Question: Okay.

"Answer: I really don't think it's fair. I told you what I did and you don't believe me. Now, you're putting words in my mouth. I think it's unfair.

"Question: I didn't try to put words in your mouth, Mr. Apfelbaum.

"Answer: You're telling me I went down to Florida. Will you read it? Can she read it back the way you said it?

"Question: Please answer my question.

"Answer: If you tell it the right way, yes.

"Question: Well, if they're not right, then you say that's not correct.

[128] "Answer: I say it's not correct the way you're saying it.

"Question: You went down to Florida in March for a weekend; is that correct?

"Answer: That's correct, sir.

"Question: To play tennis; is that correct?

"Answer: No, sir, not to play tennis. I went down for a little rest. I found out that the place I was staying out had free tennis and I took advantage of it.

"Question: You went down there for the weekend in March for a rest?

"Answer: That's correct.

"Question: And, out of that weekend, you spent two hours one day and all day the next day with Harry Brown; is that correct?

"Answer: Not to my wanting to do it, believe me, I would rather have been on the beach.

"Question: When you went down there and you wanted to be on the beach—

"Answer: He asked us to stay and we stayed.

"Question: Wait a second. You're getting [129] ahead of me.

"When you were down there for a weekend, and you wanted to be on the beach, you found time to go and see Harry Brown at his place of business; is that correct?

"Answer: Just to say hello to him because I went 1,400 miles and I found out where he was at.

"Question: And, you thought you wanted to go see him down there and have lunch with him or whatever?

"Answer: Just to say hello to him, that's all.

"Question: But, he wasn't a good friend; right?

"Answer: No, he's not a good friend. Well, I don't know what you term a good friend, Mr. Madden.

"Question: Now,—

"Answer: I mean, you make—you make—your connotations of good friend, I don't understand it, really.

"Question: Well, you have told us that he wasn't a good friend or a close friend of yours.

[130] "Answer: He is not a close friend. He just happened to be somebody that I knew and I was down

1,400 miles away from home and I found out that he was down there and I went to see him. Is there anything wrong with that?"

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 77-317

THE UNITED STATES OF AMERICA

vs.

STANLEY APFELBAUM

POST-TRIAL MOTIONS

October 27, 1977

BEFORE: THE HONORABLE DONALD W. VAN ARTSDALEN

APPEARANCES:

ROBERT MADDEN, ESQ.,

—and—

RONALD COLE, ESQ.,
Assistant U. S. Attorneys

JOEL SLOMSKY, ESQ.,
Attorney for the Defendant

[11] PORTIONS OF DISTRICT COURT
PROCEEDINGS ON OCTOBER 27, 1977

* * * *

[MR. SLOMSKY]:

If I might go on to another point and that is with respect to the additional portions of Grand Jury testi-

mony which were [12] read to the jury over defense's objection.

I had no objection under U. S. versus Hockenberry, certainly to the jury being read those portions of the Grand Jury testimony which made up the corpus delecti, as I understand it, and those were the questions and answers in the indictment.

I had no objection to other questions and answers being read which specifically related to the questions and answers in the indictment. But I did object to other questions and answers which permitted Mr. Madden, on behalf of the Government, to tell the Grand Jury, to tell the jury in his opening and again argue in his closing and bring in Mr. Orem's testimony that it was a pattern of deceit or pattern of lying to the Grand Jury that was present in Mr. Apfelbaum's testimony.

If there were other instances of him lying to the Grand Jury, I would submit to the Court that the Government should have charged him in other counts, which they didn't do.

But the immunized testimony is protected testimony and it's. I believe, it [13] goes beyond United States versus Hockenberry in which the—in that case other portions of Grand Jury testimony were read to the jury by the prosecutor; I believe not only used to cross examine Hockenberry when he testified, but it seems to me that the law is that Grand Jury testimony, if it falls, is not protected.

But for Mr. Madden to argue that there is a pattern of deceit here, without establishing any falsity, or without charging the defendants with lying in other, shall we say material respects, it seems to me is a violation of the Hockenberry rule and violation of the Fifth Amendment.

THE COURT: Of course there were two specific counts that the jury found that the defendant did lie about. It seems to me if there are two counts, and read those portions, that deal directly with those questions, that the Government can argue that that shows a pattern

of deceit. I don't think there is any quantitative basis for saying that the Government could not argue that.

MR. SLOMSKY: Well, as I understand what the Government was arguing, it was not [14] that they were—because he lied in these two instances that was specified in the indictment. It was a pattern of deceit. But because he may have lied in other instances which go beyond the two counts containing the charges, there is a pattern of deceit.

I don't understand Mr. Madden, during the trial, just to be limiting it to those two counts.

THE COURT: Well, suppose the Government charges a person with only one lie. Don't you think at the trial of the case, since the question of whether it was intentional or not, done with knowledge, don't you think they could show there were multiple lies throughout the testimony, assuming there was no surprise about it; I mean there might be questions having to do with the right to have that disclosed prior to trial or something of that sort. I don't know, but I mean as a matter of evidence, wouldn't it be properly admissible evidence?

MR. SLOMSKY: I would submit to your Honor no. And I say it for this particular reason. I filed a motion for bill of [15] particulars because I wanted to know specifically as to which questions and answers I had to meet in order to defend this case and I believe at the preliminary hearing we got very specific about those questions and answers which the Government contended contained a false statement.

Now at trial for the first time I learned that there are other questions and answers which the Government now wishes to argue to the jury which contain false statements. This did come as a surprise. I thought that under Hockenberry that those specific questions and answers in the indictment would be what I would have to meet; but that just was not the case.

With respect to the knowledge element, certainly there are instances when knowledge is in issue as it was in this case, when other evidence to establish that knowledge can come in. Certainly that's the law. But as I argue in my motion here, let's say Mr. Orem's testimony regarding the

$10,000.00 loan, did not establish that he lent anybody $10,000.00, so I can't see how it's relevant to establish [16] a—making more probable the fact that he told the agents he loaned Harry Brown $10,000.00 or that he tried to locate Harry Brown in Florida in December of 1975.

THE COURT: It did show he was in some way involved in the transaction involving $10,000.00, involving Harry Brown.

MR. SLOMSKY: I don't deny that, sir.

THE COURT: Wouldn't that be some evidence from which a jury could conclude that he may have told the Government agents—isn't it some support for the proposition he would have told the Government agents he would have made the loan of $10,000.00?

MR. SLOMSKY: I would submit no. Why would a person tell an agent, F.B.I. agent that he lent somebody $10,000.00 when, in fact, he never lent that money.

Now you recall the testimony of—

THE COURT: That was one of the questions that the Grand Jury wanted to know. That was cut off for that. There might be a reason that person might tell the F.B.I. agents a lie. There is nothing illegal about that. Under normal circumstances it could [17] possibly constitute an obstruction of justice, but normally if you are just discussing something with them, I don't know that it would constitute a crime. But there might still be reasons for lying to an F.B.I. agent to throw him off the trail.

MR. SLOMSKY: Well, again the issue is whether or not the evidence regarding the $10,000.00 loan somehow was relevant to knowledge. I have argued it's not relevant to knowledge.

Even if it's relevant to knowledge, the circumstances surrounding the obtaining of that loan just came out so sinister at the trial that any value that it might have would be outweighed by the prejudicial effect that it had.

THE COURT: I think I told the jury, at least twice, I believe, that there was no evidence that there was anything wrong or illegal about this, if, in fact, there had been such a transaction or loan, and that its purpose was

not to show that in any way and they can entirely disregard it.

MR. SLOMSKY: Again, as I indicated—

[18] THE COURT: Should disregard any such inference, not that they should disregard the evidence.

MR. SLOMSKY: Again, sir, I would submit to the Court that it was so prejudicial that cautionary instruction would not really alleviate the danger, although I understood the necessity for it at the time.

The evidence regarding that $10,000.00 loan was that Mr. Brown and Mr. Apfelbaum came there and perhaps were given to both men and they left. Mr. Orem was not sure whether or not Mr. Apfelbaum returned that afternoon, although I think the other witness, Mr. Scheuren, said he did return that afternoon and the loan was taken out in someone else's name, who was the District Attorney of Philadelphia.

It just seems to me that circumstances surrounding that loan were just so sinister in the eyes of the jury that it had to clearly contribute to the verdict.

THE COURT: I don't agree with that because we know, as a matter of fact, that a person could be authorized to do this and it [19] would not have constituted a criminal offense and I think I explained that to the jury very carefully that transactions such as that is not illegal in any way.

In the absence of some further evidence, I don't think the jury could have possibly got any different idea from that.

MR. SLOMSKY: Well, really what I am covering now is two issues. I started out with the issue regarding other portions of the testimony, whether or not it was error to admit that testimony, Mr. Orem's testimony.

In the Advisory Committee notes to Rule 403 they define "unfair prejudice" as meaning something that would have an undue tendency to suggest a decision or improper basis commonly, though not necessarily emotional one. Just seems to me that the evidence concerning that $10,000.00 loan, injected into the trial, is an improper issue or something improper was done despite the Court's

cautionary instructions and it was just so prejudicial, even if it did have some relevance to the issue of knowledge, that I would submit to your Honor that it was evidence to admit that particular [20] loan.

* * *

[26] [MR. MADDEN]:

Your Honor, unless the Court has any questions on materiality, I will go on to Hockenberry.

Hockenberry, your Honor, the decision there was a very clear case. What happened was Mr. Hockenberry was brought before the Grand Jury. He was granted immunity. While he was granted immunity he answered certain questions truthfully. Those questions that he answered truthfully dealt with his forging or counterfeiting sworn statements under oath. I believe it was for affidavits. In other [27] words, he admitted certain wrongdoing in the Grand Jury. All right. He was tried on a completely unrelated perjury charge, completely unrelated. He took the stand and testified in his own behalf. After testifying on his own behalf the Government, in cross examination, used his truthful admissions of wrongdoing to impeach him.

Your Honor, the Court felt that for the immunity grant to be coexistent with that Fifth Amendment privilege, the Government should not be allowed to use the truthful admissions of wrongdoing. That is not what we used in this case.

In this case, your Honor, the statements of Mr. Apfelbaum that were presented to the jury, that were complained of by Mr. Slomsky were all false statements, statements that were shown to be false by the other evidence that related in some way to the counts in the indictment. In other words, they related to the fact that he had no idea that there was a loan between Mr. Fitzpatrick and Mr. Brown when, in fact, he did. He was present.

[28] They related to the fact that he never had any financial dealings with Mr. Brown when, in fact, he did. They all relate to whether or not there was a $10,000.00 loan, whether he told anyone there was a $10,000.00, and

whether he ever attempted to locate Harry Brown in Florida.

Now I don't believe that Mr. Slomsky's characterization of being surprised is accurate.

Your Honor, we sat down and in my office, before trial, went through the Grand Jury testimony, at which time we discussed what portions the Government wished to present and Mr. Slomsky made his objections to certain portions. We were able to decide between us ninety percent of the testimony that was presented to the Grand Jury.

Even after that point, your Honor, the Government relented and removed certain other testimony. Mr. Slomsky knew beforehand exactly what the Government intended to introduce at trial and if there was any surprise, from Mr. Slomsky's point of view, it was from his misunderstanding of the law.

[29] Mr. Slomsky apparently would have the Government only introduce evidence to show intent that would be of a neutral nature, either directly relating to the charge in issue or be of such a neutral nature. In fact, the fact is, many times, when we are trying to get intent in a criminal act, the intent is proven by other criminal acts or other acts that, although not charged, tend to show the individual's state of mind.

I think that in this particular case the testimony concerning the $10,000.00 loan clearly showed that there was a basis for Mr. Apfelbaum's statement to the agents.

The agents testified Mr. Apfelbaum told him that the reason he was down there in Florida in December of 1975 was to locate Harry Brown to collect the $10,000.00 loan; that it was an extremely complicated arrangement. He had been making payments on the loan but he would not go into detail. This is what the agents testified.

Now all of that is substantiated, ninety percent is substantiated by Mr. Orem's testimony. There was indeed a $10,000.00 [30] loan. It was indeed prior to the robbery. It was indeed a complicated arrangement inasmuch as it was not in Mr. Apfelbaum's name, but in Mr. Fitzpatrick. Mr. Apfelbaum was indeed making payments on that loan.

I believe it was extremely relevant to show Mr. Apfelbaum's intent, his plan, the knowledge, the absence of any mistake or accident when he appeared before the Grand Jury, as well as proof of motive for lying to the Grand Jury.

Your Honor, I would go on from there, from Hockenberry, unless the Court has anything.

* * *

[32] [MR. SLOMSKY]:

Secondly, with respect to surprise, everything Mr. Madden says is accurate. In other words, we discussed the Grand Jury testimony, which portions I agreed to, which portions I did not agree to, but I think ultimate surprise arose when—really during the opening when I heard Mr. Madden say "pattern of deceit" and et cetera. I think in that regard I learned for the first time that the Government would contend in other portions of the Grand Jury testimony, to this jury, were false beyond those specific ones in two counts.

I thought that the other portions of the Grand Jury testimony that Mr. Madden [32] wished read he desired so because they were relevant to show knowledge or intent with respect to these two particular counts; but I did not know that he would argue pattern of deceit or scheme of deception. I think that's where we differ on this particular issue.

* * *

[35] [THE COURT]:

As to the contention that the evidence was being used in some way in violation of the grant of immunity given to Mr. Apfelbaum before the Grand Jury, it's my understanding of the law, and set forth in Hockenberry, that a grant of immunity never immunizes a person against giving untruthful testimony and therefore I see nothing that would prohibit—I see nothing in the grant of immunity that would prohibit the Government, during the course of a trial, from introducing evidence of testimony given in a Grand Jury and then [36] introducing evidence to show that that was false or not truthful, if it

was in other ways relevant or material to the issues being presented in that case. That is to say that the grant of immunity itself does not mean that you can never use untruthful testimony. Merely prohibits, as I understand it, the use of truthful testimony from being used against the defendant in a subsequent trial. I don't believe that was done in this case and therefore I see no violation of that rule. For that reason the motions for judgment of acquittal and/or for a new trial are denied. Sentencing date has been set for tomorrow. I believe that the presentence report has been prepared and that my clerk has it. I have not seen it at all yet. I will examine it today. Counsel are free to examine it at their convenience also today or tomorrow morning before sentencing.

* * *

SUPREME COURT OF THE UNITED STATES

No. 78-972

UNITED STATES, PETITIONER

v.

STANLEY APFELBAUM

ORDER ALLOWING CERTIORARI

Filed March 19, 1979

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 291098 375

FEB 14 1979
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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-972

UNITED STATES OF AMERICA,
Petitioner

v.

STANLEY APFELBAUM,
Respondent

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondent, Stanley Apfelbaum, respectfully requests lease to file the attached Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

Respondent's Affidavit in support of this Motion is attached hereto.

Joel Harvey Slomsky

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(215) 568-6188

Attorney for Respondent
Stanley Apfelbaum

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 197

NO. 78-9' 2

UNITED STATES OF AMERICA,
Petitioner

v.

STANLEY APFELBAUM,
Respondent

A F F I D A V I T

I, Stanley Apfelbaum, being duly sworn according to law, depose and say in support of my Motion for leave to proceed without being required to prepay costs or fees:

1. I am the respondent in the above entitled case.

2. Because of my poverty, I am unable to pay the costs of said case.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress that I seek in said case.

5. The nature of said case is briefly stated as follows:

I am filing a Brief in Opposition to the Government's Petition to the United States Supreme Court wherein the Government seeks a reversal of the decision of the Third Circuit Court Appeal granting me a new trial.

Stanley Apfelbaum
STANLEY APFELBAUM

Sworn to and subscribed:
before me this 12th day:
of February 1979:

Helen Tangrade
Notary Public

Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires Dec. 21, 1981

FILED
FEB 14 1979
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-972

UNITED STATES OF AMERICA,
Petitioner

v.

STANLEY APFELBAUM,
Respondent

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORATI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-972

UNITED STATES OF AMERICA,
Petitioner

v.

STANLEY APFELBAUM,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Respondent, Stanley Apfelbaum, by his attorney, Joel Harvey Slomsky, Esquire, prays that the Petition for Writ of Certiorari filed by the Government in the above matter be denied, and respectfully submits the following Brief in opposition thereto.

QUESTION PRESENTED

1. IS THE GOVERNMENT PERMITTED UNRESTRICTED USE OF A GRAND JURY WITNESS' TRUTHFUL IMMUNIZED TESTIMONY AT A TRIAL OF THAT WITNESS FOR FALSE SWEARING WHEN SUCH STATEMENTS HAVE NOT BEEN CHARGED AS THE CORPUS DELECTI OF THE FALSE STATEMENT OFFENSE?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides, in pertinent part:

> "No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

"Section 201(a) of the Organized Crime Control Act of 1970, 18 U.S.C. 6002, provides:

"Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to--

(1) a court or grand jury of the United States,
(2) an agency of the United States, or
(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

STATEMENT OF THE CASE

For purposes of this Brief, respondent accepts the procedural history and facts set forth in petitioner's Statement of the Case with the following additions:

At the trial of this case, the government introduced practically overwhelming evidence, independent of the immunized grand jury testimony, that respondent, Apfelbaum, lied when he denied trying to locate Harry Brown in Florida in December 1975 (Count I), and lied when he denied telling FBI agents that he had lent $10,000.00 to Brown (Count II).

Not being satisfied with this evidence of falsity, the government then read to the jury in its case in chief, over defense objection, portions of the immunized grand jury testimony not specified in the indictment. The record in this case

is totally devoid of any evidence that any of the following immunized testimony referred to in the Third Circuit's opinion is false (584 F.2d at 1268):

> "The immunized testimony introduced at trial related to a range of topics relevant to the prosecution's case. These included inter alia (1) the degree of friendship between Apfelbaum and Brown (App. 96a-98a); (2) the circumstances surrounding Apfelbaum's discovery of, and visit to, Brown in Florida in 1976 (App. 107a, 110a, 124a-29a); (3) whether Apfelbaum and Brown discussed any loan transactions while in Florida (App. 112a); (4) whether Brown "patted down" Apfelbaum for weapons during his visit, or merely hugged him (App. 133a); (5) Apfelbaum's denial that he ever engaged in financial transactions with the Chestnut Hill dealership other than a $500 loan (App. 114a); (6) Apfelbaum's denial that he ever co-signed a loan for Brown (App. 115a); (7) a statement that Apfelbaum was introduced to one John Orem by Harry Brown (App. 116)."

The government claimed in the District Court and Third Circuit Court of Appeals that they "doubted" the truth of his testimony. The government never offered any evidence to show such testimony was false. It appears from its Petition for a Writ of Certiorari that the government has abandoned its claims of falsity which were based upon sheer speculation. It now argues that as long as a perjury prosecution is brought, it has the right to unrestricted use of relevant truthful immunized testimony. This position was rejected by the Third Circuit.

REASONS FOR DENYING THE PETITION

1. NO COURT OF APPEALS HAS ALLOWED THE GOVERNMENT TO USE TRUTHFUL IMMUNIZED GRAND JURY TESTIMONY COMPELLED UNDER 18 U.S.C. §6002 TO PROVE SCIENTER OR THE FALSITY OF OTHER GRAND JURY TESTIMONY.

The Seventh and Third Circuits both agree that immunized testimony may be used only to the extent necessary to establish the corpus delecti of the charged perjury "together with no more than the minimal testimony essential to place the charged falsehood into its proper context". Apfelbaum, 584 F.2d at 1270,

n.9; United States v. Patrick, 542 F.2d 381, 385 (7th Cir.), cert. denied, 430 U.S. 931 (1977).

The Second and Tenth Circuits have held that immunized testimony may be used for any purpose if it is false, but that truthful immunized testimony may not be used at all, even in a prosecution for perjury. See United States v. Dunn, 577 F.2d 119, 125-126 (10th Cir. 1978), cert. granted, No. 77-6949 (December 11, 1978,[1] United States v. Berardelli, 565 F.2d 24, 28 (2d Cir. 1977).

In United States v. Kurzer, 534 F.2d 511, 518 (2nd Cir. 1976), the Second Circuit explained as follows:

> "Tramunti (500 F.2d 1334) permitted the Government, in a prosecution for perjury at a criminal trial, to use for impeachment purposes and as evidence of prior similar acts false testimony given by the defendant while immunized on a prior occasion. We reasoned that the immunity like the privilege itself, covers the incriminatory truth, not the exculpatory falsehood. 500 F.2d at 1342, 1345. But the Government's argument here goes much further, for it would permit the use, if the prosecutor felt the immunized witness was not truthful in all respects, not only of the false testimony, but also of the truthful and incriminatory information given by the witness, contrary to the reasoning of Tramunti. We decline to go so far." (Emphasis Added).

In the instant Petition, the government claims it can use all relevant truthful immunized grand jury testimony to prove scienter or falsity. No court of appeals has approved such use of truthful immunized testimony under 18 U.S.C. §6002.

The truthful portions of respondent's immunized grand jury testimony read to the jury were not inconsistent with the testimony claimed to be false in the indictment. Moreover, under Apfelbaum, supra, the government is not precluded from introducing testimony essential to place the charged falsehood into its

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[1] As the government concedes in its Petition for a Writ of Certiorati at p. 19, the decision by this court in Dunn will not necessarily control the disposition of this case.

proper context. In this regard, the government's claim that the Third Circuit's decision will impair its ability to prosecute witnesses for perjury committed under a grant of immunity is purely speculative. In the instant case, the evidence, apart from the truthful immunized testimony, was more than ample to convict. There was no need here for the government to violate the immunity grant and the Fifth Amendment by introducting truthful portions of the grand jury testimony.

2. THE THIRD CIRCUIT'S HOLDING THAT GRAND JURY TESTIMONY WHICH IS COMPELLED UNDER A GRANT OF IMMUNITY MAY BE UTILIZED ONLY AS THE CORPUS DELECTI OF AN INDICTMENT FOR PERJURY OR FALSE SWEARING IS ENTIRELY CONSISTENT WITH 18 U.S.C. §6002 AND THE FIFTH AMENDMENT.

The opinion of the Third Circuit explains in great detail the reasons and precedent underlying its holding in Apfelbaum that grand jury testimony which is compelled under a grant of immunity may be utilized only as the corpus delecti of an indictment for perjury or for false swearing. 18 U.S.C. §6002 broadly provides in relevant part that "no testimony or other information compelled under the [immunity] order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement or otherwise failing to comply with the order". As the Third Circuit stated in Apfelbaum, 584 F.2d at p. 1269:

> "A grant of "use and fruits" immunity conferred under 18 U.S.C. §6002 may indeed substitute for the fifth amendment privilege, but only because its protection against the subsequent use of the compelled testimony is coextensive with the scope of the privilege. Kastigar v. United States, 406 U.S. at 453. That is, the grant of the immunity must, by definition, afford the witness the same protection he would have received had he invoked the privilege. See Kastigar v. United States, 406 U.S. at 462; United States v. Frumento,

552 F.2d 534, 542-43 (3d Cir. 1977) (en banc); United States v. Kurzer, 534 F.2d 511, 516 (2d Cir. 1976). Because a witness who has properly invoked the privilege may remain silent, see Kastigar v. United States, 406 U.S. at 461, use and fruits immunity under section 6002 "prohibits the prosecutorial authorities from using the compelled testimony in any respect". Id. at 453 (emphasis in original); accord, United States v. Frumento, 552 F. 2d at 543; United States v. Hockenberry, 474 F.2d 247 (3d Cir. 1973). Put another way, invocation of the privilege would have left Apfelbaum in a position where he would not have answerd questions, truthfully or falsely, and thus such answers could not have been used against him. In the words of the Constitution, he would not have been compelled to "be a witness against himself". (Footnote omitted)."

Once a witness testifies falsely, however, he is subject to a perjury or false swearing prosecution. Apfelbaum and other Third Circuit cases, United States v. Frumento, supra, and United States v. Hockenberry, supra, do not prohibit a perjury prosecution, but merely hold that use of the witness' immunized testimony is limited only to its use as the basis of a perjury indictment. If the government has evidence that immunized testimony is perjurious, its remedy is to indict the witness for perjury and to specify in the indictment the false testimony.

Any use of truthful immunized testimony as substantive evidence by the government would be a violation of the immunity grant, result in compelling a person to "be a witness against himself" in violation of the Fifth Amendment, and offend Kastigar v. United States, supra.

3. THE THIRD CIRCUIT'S DECISION IS NOT CONTRARY TO THIS COURT'S OPINION IN CAMERON V. UNITED STATES, 231 U.S. 710 (1914).

The government contends that the Third Circuit's opinion is contrary to Cameron v. United States, 231 U.S. 710 (1914). Cameron is vastly different factually from the instant case. In Cameron, the defendant was indicted twice for committing

perjury in two separate bankruptcy proceedings. The first indictment alleged that the defendant lied when he testified before a special examiner and commissioner prior to being adjudicated a bankrupt as follows:

> "First. That he, the said Albert B. Cameron, the aforesaid witness, shortly prior to the filing of the aforesaid petition in bankruptcy, against the said Knickerbocker Piano Company, had sold a number of pianos to William C. Smith, the petitioner in bankruptcy aforesaid.
> "Second. That he, the said Albert B. Cameron, the witness aforesaid, had a conversation with the said William C. Smith, concerning the sale to him of pianos by him, the said Albert B. Cameron.
> "Third. That he, the said Albert B. Cameron, the aforesaid witness, had sold to the said William C. Smith, eight pianos for the sum of six hundred and sixty-eight dollars."

The second indictment alleged that the defendant lied when he testified before a bankruptcy referee as follows:

> "First. That he, the said Albert B. Cameron, had not been able to obtain the address of the said William C. Smith and had never known the said address.
> "Second. That he, the said Albert B. Cameron, had had a conversation or conversations with the said William C. Smith in regard to his, the said William C. Smith's buying pianos of and from the said alleged bankrupt."

At trial, the defendant objected to the government reading into evidence portions of his testimony given before the commissioner which directly contradicted testimony before the referee. The court held that such use of immunized testimony violated the immunity grant.

In the instant case, the government has attempted to use truthful immunized testimony to prove that other portions of grand jury testimony were false. Cameron appears to reject this approach in accordance with the decisions of the courts of appeals.

In Cameron, the court, while discussing Glickstein v. United States, 222 U.S. 139 (1911) which held that a witness may be prosecuted for perjury committed while giving immunized testimony, stated at p. 720-721: "We cannot agree with petitioner's contention that the use of such testimony is limited to proving that it was in fact given. In prosecutions for perjury the statute saved the right to use such testimony for any legitimate purpose in establishing the charge made". The government contends that these two sentences allow it wholesale use of pages and pages of relevant truthful grand jury testimony provided a perjury charge is brought. However, at the very least, for this quote to be consistent with the Fifth Amendment, it would require that the use of such testimony be limited to testimony demonstrably false. The Third Circuit requires the false testimony to be set forth in the indictment. The Second and Tenth Circuits appear to require the government to make a show as to the falsity of other immunized testimony, apart from the testimony claimed to be false in the indictment, before such testimony can be used at a perjury trial. See Apfelbaum, 584 F.2d at 1272, n. 10.

For the above reasons, Cameron v. United States, supra, is not inconsistent with the Third Circuit's decision, but appears to be in accord with Apfelbaum.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Joel Harvey Slomsky

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Stanley Apfelbaum

Cm

No. 78-972

Supreme Court, U.S.
FILED
JUL 25 1979
MICHAEL RODAK, JR., CLERK

In The Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

STANLEY APFELBAUM

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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In The Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-972

UNITED STATES OF AMERICA, PETITIONER

v.

STANLEY APFELBAUM

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 584 F.2d 1264.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1978. A petition for rehearing was denied on October 16, 1978 (Pet. App. 24a). On November 6, 1978, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including December 15, 1978. The petition was filed on that date and was granted on March 19, 1979 (A. 80). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in prosecuting a grand jury witness for testifying falsely under a grant of immunity, the government may introduce at trial relevant portions of the witness's immunized testimony other than the statements charged as the *corpus delicti* of the false statements offense.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

The federal immunity statute, 18 U.S.C. 6002, provides:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> (1) a court or grand jury of the United States,
>
> (2) an agency of the United States, or
>
> (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,
>
> and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

STATEMENT

1. In 1976, respondent was called to testify before a federal grand jury in the Eastern District of Pennsylvania. The grand jury was investigating alleged criminal activities by the president and the general manager of the Chestnut Hill Lincoln-Mercury automobile dealership in Philadelphia (Tr. 4–9). The investigation focused on a robbery of $175,000 in cash that occurred at the dealership on April 16, 1975, and allegations that that robbery might have been staged by the dealership's principals (Tr. 5, 9). The grand jury sought to question respondent to determine whether he was an aider and abettor or an accessory after the fact to the allegedly staged robbery (Tr. 8–9). Respondent at that time was an administrative assistant to the Philadelphia District Attorney.

Relying on his privilege against compulsory self-incrimination, respondent refused to testify. On October 20, 1976, he was granted immunity under 18 U.S.C. 6002 and was recalled before the grand jury (A. 5–6). Respondent still refused to testify. He was then held in contempt under 18 U.S.C. 1826 and confined for six days. Respondent subsequently agreed to testify before the grand jury, and on December 13, 1976, and January 3, 1977, he testified pursuant to the immunity order (Pet. App. 2a–3a; Tr. 3–8).

Respondent was questioned before the grand jury about his financial dealings with Harry Brown, the general manager of the automobile dealership. In particular, he was asked whether he had been involved in obtaining a $10,000 loan for Brown in early 1975, whether he had attempted to locate Brown in Florida in 1975, and why he had met with Brown in Florida in early

1976 (A. 32–70). Respondent denied that he had tried to locate Brown in Florida in 1975 (A. 45–46, 54), and he also denied that he had told FBI agents he had lent $10,000 to Brown (A. 33, 35, 33, 39, 60, 62). In July 1977 the grand jury indicted respondent,[1] charging that these two statements were false, that respondent knew they were false, and that the questions asked by the grand jury were material to its investigation (A. 7–18; Pet. App. 3a).[2]

The indictment contained excerpts from the grand jury proceedings in which respondent made the allegedly false statements. The first count of the indictment recited the portion of respondent's December 13, 1976, grand jury testimony in which he denied that he had tried to locate Brown in Florida in December 1975 (Pet. App. 3a–5a). The second count recited the portions of his December 13, 1976, and January 3, 1977, testimony in which he denied that he had told FBI agents that he had lent $10,000 to Brown.

2. The evidence at trial showed that in February 1975 respondent and Brown had applied for a $10,000 loan at the Industrial Valley Bank in Philadelphia, where Brown had maintained an account in connection with the Chestnut-Hill automobile dealership (Tr. 200–203, 298). This loan application was purportedly made on behalf of respondent's superior, Philadelphia District

[1] The grand jury initially indicted respondent in April 1977 on three counts of making false material declarations before the grand jury. That indictment was dismissed by the district court on grounds not pertinent here.

[2] The district court found that the statements were material (Tr. 440) on the basis of the government's proof, outside the presence of the jury, regarding the nature of the grand jury's investigation. Brown and the president of the Chestnut Hill automobile dealership were subsequently convicted on charges of mail fraud, racketeering, collecting extensions of credit by extortionate means, and conspiracy (Pet. App. 3a, n.2; *United States* v. *Brown*, 583 F.2d 659 (3d Cir. 1978), cert. denied, Nos. 78–791 and 78–896 (Feb. 21, 1979)).

Attorney F. Emmett Fitzpatrick (Tr. 204, 298). The loan was approved, and in early March $10,000 was credited to a checking account in Fitzpatrick's name (Tr. 215, 221–224). In the following week, checks for $9,500 and $475 were drawn on the account and cashed by Brown (Tr. 226–229, 231–235). Thereafter, respondent made interest payments on the loan until it was repaid approximately 13 months later with a check drawn on an account Fitzpatrick had with another bank (Tr. 231–235, 290).

In December 1975, respondent applied to the same bank for a $2,500 loan. He told two bank officials at that time that he would be travelling to Florida and that he intended to contact Brown while he was there (Tr. 239–241, 298–299). A few days later, respondent visited a school in Fort Lauderdale, Florida, where Brown's daughter was enrolled (Tr. 137). Respondent displayed his identification from the Philadelphia District Attorney's office, stated that he was a friend of Brown, and asked for Brown's address (Tr. 137, 146). He was told that that information could not be released without Brown's authorization (Tr. 138). The next day, a school official contacted respondent at a local hotel and advised him that Brown could not be reached (Tr. 151). Later in the month, respondent tried to obtain Brown's address from a bank in Florida (Tr. 165–170).

In March 1976, respondent was questioned by two FBI agents who were assigned to the investigation of the automobile dealership where Brown had worked (Tr. 301–302, 325–327). Respondent told the agents that in December 1975 he had tried to locate Brown in Florida because, through an "extremely complicated arrangement," he had lent $10,000 to Brown and wanted to recover the money (Tr. 303–315, 328–331).

In addition to the foregoing evidence and the false statements alleged in the indictment, the government offered in evidence other portions of respondent's grand jury testimony in order to put the charged statements in context and to show that respondent knew they were

false (Pet. App. 8a & n.5).[3] These excerpts concerned respondent's relationship with Brown, his 1976 trip to Florida to visit Brown, the discussions he had with Brown on that occasion, and his denial that he had had financial dealings with the automobile dealership in Philadelphia or had co-signed a loan for Brown (A. 52–53, 56–62, 64–67). Respondent objected to the use of any of his immunized testimony except the portions charged in the indictment as false. The district court overruled the objection and admitted the excerpts on the ground that they were relevant to prove that respondent had knowingly made the charged false statements (A. 25–27; Pet. App. 8a–9a).[4] The jury found respondent guilty on both counts of the indictment (A. 4), and the court sentenced him to concurrent terms of two years' imprisonment (A. 4).

3. The court of appeals reversed, relying on its earlier decisions in *United States* v. *Hockenberry*, 474 F.2d 247 (3d Cir. 1973), and *United States* v. *Frumento*, 552 F.2d 534, 541–543 (3d Cir. 1977) (en banc). The court held that the government could introduce only those portions of respondent's immunized testimony that were charged as the *corpus delicti* of the false statements prosecution (Pet. App. 11a–12a). Those immunized statements that "did not form the core of, and which were not incorporated in, the indictment" could not be introduced, the court held (*id.* at 16a). Although the court acknowledged that a grant of immunity does not protect a witness from prosecution for perjury or false declarations, it concluded that the Constitution permits only "severely restricted" use of immunized testimony in a perjury or false declarations prosecution (Pet. App. 9a–13a). This "severely restricted" use, according to the court, includes "only the statement or statements of the defendant which the grand jury has charged to be perjurious, together with no more than that minimal testimony *essential* to place the charged falsehood into its proper context" (*id.* at 14a & n.9) (emphasis in original).

[3] In order to minimize the risk of unfair prejudice, references to the racketeering and extortion offenses that the grand jury was investigating were omitted from the parts of the grand jury proceedings that were read to the jury (A. 26–27).

[4] As the court of appeals noted (Pet. App. 9a n.7), respondent objected to the admission of only certain portions of the grand jury testimony; he affirmatively sought to have other portions admitted (A. 22). The government did not argue in the court of appeals and we do not argue here that respondent's acquiescence in the admission of certain parts of the grand jury testimony constituted a waiver of his privilege against compulsory self-incrimination with respect to the rest of the testimony.

SUMMARY OF ARGUMENT

A witness who validly invokes his privilege against compulsory self-incrimination can nevertheless be compelled to testify if he is granted immunity in exchange for his testimony. In order to displace the privilege, however, the grant of immunity must be coextensive with the scope of that privilege. That is, the immunity must protect the witness against the use of his testimony, direct or derivative, to prosecute him for any offense for which he could have been prosecuted at the time he invoked his privilege.

Although the government may not use a witness's immunized testimony in prosecuting him for any offenses about which he testifies, the immunized witness must testify truthfully. If his testimony is untruthful, he can be prosecuted for perjury or for making false statements. The policy underlying this rule is obvious: The purpose of immunizing a witness is to obtain his truthful testimony. If the grant of immunity entitled a witness to lie with impunity, the immunity power would be of little value to the administration of justice. Thus, because perjury undermines the entire purpose for which immunity is granted, an immunized witness in-

dicted for false swearing is not entitled to the benefits of the immunity he is charged with abusing.

The question in this case is whether, in a prosecution of a witness for false swearing in the course of his immunized testimony, the government can introduce all relevant portions of the witness's testimony to prove that the testimony was knowingly false. Because neither the Constitution nor the federal immunity statute prohibits the introduction of that evidence, the court of appeals erred in reversing respondent's conviction on that ground.

1. It is clear that portions of a witness's testimony other than the charged false statements may be relevant in a prosecution for false swearing before a grand jury. The government must prove that the questions to which the witness is alleged to have given false answers were material to the grand jury's investigation, and it must prove that the witness knew his answers were false. The context of the witness's allegedly false testimony is often highly relevant to both issues: the nature and course of the grand jury's investigation is often best shown by a transcript of the proceedings, and the witness's state of mind is often most tellingly revealed by the entire course of his testimony. If the witness is evasive throughout or on particular points, for example, the jury may fairly conclude that any false statements he may have made were intentional.

2. The Fifth Amendment does not prohibit the introduction of relevant immunized testimony to prove that other portions of the testimony were perjured. Because the immunity granted to a witness must be as broad as the privilege it displaces, it is necessary to determine the scope of the privilege at the time the witness's testimony is compelled in order to determine the scope of the immunity that is conferred.

The privilege protects a witness against being compelled to give testimony that subjects him to real and substantial risks of incrimination; it does not protect him against risks that are speculative or remote. In

particular, the privilege ordinarily does not protect against the danger of incrimination for crimes the witness may choose to commit in the future. In this case, respondent's privilege against compulsory self-incrimination entitled him to refuse to testify about the offenses that the grand jury was investigating until he was given a grant of immunity that would protect him from use of his testimony against him to prove any offenses about which he might testify. Similarly, if respondent had previously given a false sworn statement about the matters that were the subject of the grand jury questioning, he could validly have asserted his privilege not to testify because of the risk that his truthful testimony before the grand jury would generate evidence that could be used against him in a prosecution for false swearing on the prior occasion. But if he had asserted his privilege on the ground that his grand jury testimony would be incriminating if he should choose to perjure himself in the course of the proceeding, his claim would not have been upheld. The privilege simply was not designed to authorize a witness to commit perjury.

Because respondent could not have made a valid assertion of the privilege with respect to a possible future act of false swearing, the immunity he was granted does not protect him from the use of relevant portions of his testimony to prove that he made a false declaration before the grand jury.

3. The federal immunity statute, 18 U.S.C. 6002, similarly does not prohibit the use of the relevant portions of respondent's grand jury testimony. By its terms, the statute permits the use of immunized testimony in any prosecution for "perjury" or "giving a false statement." Thus, the plain terms of the statute permit the use made here. Moreover, the legislative history of the immunity statute clearly shows that Congress intended to confine the scope of the immunity to that required by the Constitution, and no more. Accordingly, if the Constitution permits the use of all rel-

evant portions of a witness's immunized testimony to prove that the witness made false declarations under the grant of immunity, the federal immunity statute should be read to permit that use as well.

ARGUMENT

RELEVANT PORTIONS OF RESPONDENT'S IMMUNIZED GRAND JURY TESTIMONY WERE PROPERLY INTRODUCED TO PROVE THAT HE LIED WHILE TESTIFYING UNDER THE GRANT OF IMMUNITY

A. Determining Whether A Witness Has Testified Falsely in a Proceeding Often Requires Consideration of Portions of His Testimony Other Than Those Alleged to be False.

In a prosecution for perjury or making false declarations, the government must prove not only that the defendant gave material false statements under oath, but also that he believed that his testimony was false. See, *e.g.*, *United States* v. *Boberg*, 565 F.2d 1059, 1061 (8th Cir. 1977); *United States* v. *Damato*, 554 F.2d 1371, 1372 (5th Cir. 1977); *United States* v. *Whimpy*, 531 F.2d 768, 770 (5th Cir. 1976). Both elements—and particularly the latter—are difficult to prove in many cases. See, *e.g.*, *United States* v. *Sweig*, 441 F.2d 114, 117–118 (2d Cir.), cert. denied, 403 U.S. 932 (1971).

Often the best evidence that a defendant knowingly gave false testimony that was material to the grand jury's investigation is provided by the context in which the statement was made. With respect to the issue of materiality, a transcript of the proceeding at which the alleged perjury was committed is commonly introduced by the prosecution because "the best way to know what the grand jury deems material is by reading what it asked about." *United States* v. *Abrams*, 568 F.2d 411, 421 (5th Cir.), cert. denied, 437 U.S. 903 (1978). See also *United States* v. *Crippen*, 570 F.2d 535, 539 (5th Cir. 1978), cert. denied, No. 78–538 (Jan. 8, 1979); *United States* v. *Koonce*, 485 F.2d 374, 380–381 (8th Cir. 1973).

With respect to the issue of knowledge, direct evidence is seldom available. Instead, the jury ordinarily must draw inferences about the defendant's knowledge from all the circumstances surrounding the offense. The context in which a witness makes allegedly false statements is highly relevant to the question whether he knew his statements were false.[5] For example, if a witness is evasive in answering certain questions, the jury may properly infer that his false testimony on those points is conscious rather than unwitting or inadvertent. See *United States* v. *Kopel*, 552 F.2d 1265, 1269–1270 (7th Cir.), cert. denied, 434 U.S. 970 (1977); *Gebhard* v. *United States*, 422 F.2d 281, 289 (9th Cir. 1970). A witness's responses to other questions may cast doubt on the truth of the statements at issue or undercut the witness's claim that he did not realize his testimony was false. See *United States* v. *Demopoulos*, 506 F.2d 1171, 1177 (7th Cir. 1974), cert. denied, 420 U.S. 991 (1975); *Gebhard* v. *United States*, *supra*, 422 F.2d at 289; *United States* v. *Remington*, 191 F.2d 246, 250–251 (2d Cir. 1951), cert. denied, 343 U.S. 907 (1952); *Meyers* v. *United States*, 171 F.2d 800, 804, 806–807 (D.C. Cir. 1948), cert. denied, 336 U.S. 912 (1949).[6]

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[5] See *Harrell* v. *United States*, 220 F.2d 516, 520 (5th Cir. 1955): "Only by a full understanding of the issues on trial at the time the alleged perjury was committed can the jury determine the willfulness of the defendant in giving his testimony. One way to prove these issues, subject to the discretion of the trial court, is by the transcript of the testimony taken at that trial."

[6] Of course, considering statements in context may also aid the defendant. A willingness to correct an earlier statement or a general display of seemingly honest confusion may negative intent by demonstrating an intent to answer truthfully or a lack of understanding of a particular line of questioning. See *Bronston* v. *United States*, 409 U.S. 352, 358 (1973); *United States* v. *Lococo*, 450 F.2d 1196, 1198 n.2 (9th Cir. 1971).

The court of appeals acknowledged that the portions of respondent's immunized testimony that were used at his trial were "relevant to the prosecution's case" (Pet. App. 8a). Excerpts from respondent's immunized testimony that were used at his trial had a particularly significant bearing on whether his statements were knowingly false. For example, respondent's general evasiveness about his relationship with Brown and about his interview with the FBI agents in 1976 (A. 34–36, 40–41, 52–53, 57–63, 67), supports the allegation that he was dissembling when he denied telling the FBI that he had lent $10,000 to Brown. Moreover, respondent's testimony about his trip to Florida in March 1976 casts doubt on the truth of his testimony that he had not tried to locate Brown when he was in Florida during the preceding December. Respondent testified that he had gone to Florida in March 1976 for a weekend vacation and that he had no intention of contacting Brown at that time (A. 46–47). He explained that he discovered through a friend that Brown was there and that he contacted Brown at a used car dealership where Brown worked. As a result of this casual encounter, respondent testified, he spent most of the remainder of the weekend with Brown and his family (A. 45, 47–48, 56–60, 65, 69). Respondent was unable, however, to tell the grand jury the identity or even the sex of the person from whom he had allegedly learned that Brown was in Florida (A. 65–67). In addition, respondent had great difficulty reconciling his testimony that he went to Florida on a weekend vacation for a rest and that he contacted Brown "just to say hello" with his testimony that he spent a large part of the weekend at Brown's home (A. 47–48, 52, 59, 60–69).

The clear inference to be drawn from this testimony is that respondent knew Brown well, that he travelled to Florida in March 1976 in an effort to locate Brown, and that his effort at that time was a continuation of an earlier attempt to locate Brown in Florida in December 1975. Accordingly, respondent's account of the March

1976 trip significantly buttressed the government's contention that respondent's testimony concerning the December 1975 trip was false.

The rule adopted by the court of appeals—that only the allegedly false portions of respondent's immunized testimony could be introduced at his trial—would prohibit the introduction of any of this highly probative evidence. The Third Circuit's ruling would thus make it much harder to prosecute immunized witnesses for perjury than to prosecute witnesses who have not been given immunity. This "partial immunity" from prosecution for perjury for immunized witnesses conflicts with the basic proposition that immunity provides no protection against a prosecution for perjury. Accordingly, the ruling of the court of appeals should stand only if it is compelled by either the Constitution or the federal immunity statute.

B. The Fifth Amendment Does Not Prohibit the Use of Relevant Portions of a Witness's Immunized Testimony to Prove that the Witness Knowingly Made False Statements Under the Grant of Immunity.

It is well settled that a witness may be prosecuted for perjury or for making false declarations in the course of his immunized testimony. This Court has always permitted such prosecutions, even when the immunity statute in question contained no express exception for perjury. See, *e.g.*, *United States* v. *Wong*, 431 U.S. 174, 178 (1977); *United States* v. *Washington*, 431 U.S. 181, 189 (1977); *United States* v. *Mandujano*, 425 U.S. 564, 577–578 (1976) (plurality opinion); *id.* at 584-585 (Brennan, J., concurring in the result); *id.* at 609 (Stewart, J., concurring in the result); *Glickstein* v. *United States*, 222 U.S. 139 (1911).

The question presented in this case is whether, in such a prosecution, the government may introduce all relevant portions of the witness's immunized testimony

to prove that particular portions of his testimony were knowingly false, or whether the government is limited to introducing only those portions of the immunized testimony that are actually charged as false. We contend that the Constitution permits the introduction of all relevant portions of the witness's testimony in a prosecution for testifying falsely under a grant of immunity. This conclusion follows inevitably if the Court agrees with the following propositions:

(1) The scope of the immunity conferred in overriding an invocation of the privilege is precisely coextensive with the right of non-incrimination enjoyed by the witness at the time the testimony is compelled; and

(2) A witness may not properly invoke the privilege against compulsory self-incrimination to refuse to answer questions before a grand jury on the ground that he may perjure himself in the course of his testimony.

We now turn to establishing the correctness of these two propositions.

1. *A grant of immunity must be as broad as, but need be no broader than, the privilege it displaces.*

The Fifth Amendment privilege against compulsory self-incrimination protects a person against being compelled to testify when he reasonably believes his testimony could incriminate him. *Kastigar* v. *United States*, 406 U.S. 441, 445 (1972). The privilege is available only if the witness's answer to a particular question would expose him to a real and substantial danger of incrimination. If the testimony could not incriminate him, or if the threat of incrimination is merely speculative or remote, the privilege may not be invoked. See *Marchetti* v. *United States*, 390 U.S. 39, 53 (1968); *Hoffman* v. *United States*, 341 U.S. 479, 486-487 (1951); *Rogers* v. *United States*, 340 U.S. 367, 373-375

(1951); *Mason* v. *United States*, 244 U.S. 362, 365-367 (1917); *Heike* v. *United States*, 227 U.S. 131, 144 (1913); *Brown* v. *Walker*, 161 U.S. 591, 599-600 (1896).[7]

Even when a witness makes a valid assertion of the privilege, he can be compelled to testify if the government grants him immunity in place of the protection afforded by the privilege.[8] As long as the immunity removes the danger against which the privilege protects, the witness's testimony can constitutionally be compelled. That is, in order to substitute for the privilege, the immunity must be coextensive with the privilege that it supplants, but it need not be any broader. *Kastigar* v. *United States*, *supra*, 406 U.S. at 449, 453; *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 54, 78 (1964); *Brown* v. *Walker*, *supra*, 161 U.S. at 595, 610.

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[7] This standard is commonly traced to the English case of *Regina* v. *Boyes*, 121 Eng. Rep. 730, 738 (Q.B. 1861) (Cockburn, C. J.) ("the danger to be apprehended must be real and appreciable * * * not a danger of an imaginary and unsubstantial character"). See VIII J. Wigmore, *Evidence* §2260 (McNaughton rev. 1961).

Moreover, the determination whether the risk of incrimination is sufficiently great to warrant the protection of the privilege is not left to the witness, but must be made by a court if the witness's invocation of the privilege is challenged. *United States* v. *Mandujano*, *supra*, 425 U.S. at 575 (plurality opinion); *Hoffman* v. *United States*, *supra*, 341 U.S. at 486; *United States* v. *Burr*, 25 F. Cas. 38, 39-40 (C.C. Va. 1807) (No. 14, 692e) (Marshall, C. J.); *In re Pillo*, 11 N.J. 8, 18-20, 22, 93 A.2d 176, 181-183 (1952) (Brennan, J.).

[8] Granting immunity has long been recognized as an appropriate means of accommodating the right of the public to demand every man's evidence and the right of the individual not to be forced to incriminate himself by his testimony. The historical background of immunity or "indemnity" statutes is traced in *Kastigar* v. *United States*, *supra*, 406 U.S. at 443-446. See also L. Levy, *Origins of the Fifth Amendment* 328-329, 384-404 (1968); VIII J. Wigmore, *Evidence*, *supra*, at §2281; Comment, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 Yale L.J. 1568 (1963).

2. *The privilege, and thus the immunity granted in its place, ordinarily does not extend to crimes the witness may commit in the future, including perjury.*

Because a witness is not entitled to assert his Fifth Amendment privilege with respect to speculative risks of incrimination, he ordinarily is not permitted to assert the privilege on the basis of crimes he might commit in the future. Thus, even if his testimony would provide the government with information that could prove useful in prosecuting him for offenses that he might commit after testifying, he ordinarily cannot refuse to testify on that ground. See *United States* v. *Freed*, 401 U.S. 601, 606–607 (1971); *id.* at 611–612 (Brennan, J., concurring); *United States* v. *Bryan*, 339 U.S. 323, 340–341 (1950); *Glickstein* v. *United States*, *supra*, 222 U.S. at 142; *United States* v. *Tramunti*, 500 F.2d 1334, 1344 (2d Cir. 1974).

In *Marchetti* v. *United States*, *supra*, 390 U.S. at 39, the Court declined to apply a rigid distinction between past and future offenses in determining whether the privilege is available. The Court noted that "prospective acts will doubtless ordinarily involve only speculative and insubstantial risks of incrimination" (390 U.S. at 54). Nonetheless, it declined to apply that general principle to the case of a professional gambler engaged in a continuing course of illegal conduct and faced with a registration scheme designed primarily for law enforcement purposes. In those circumstances, the Court concluded, the risk of incrimination with respect to future acts was sufficient to justify upholding the claim of privilege.[9]

[9]The Court also upheld the claim of privilege on the ground that the registration and tax payment requirements at issue in the case posed substantial hazards of incrimination with respect to Marchetti's current and past activities, because "satisfaction of those requirements increases the likelihood that any past or present gambling offenses will be discovered and successfully prosecuted" (390 U.S. at 52).

The subsequent decision in *United States* v. *Freed*, *supra*, made it clear that the Court in *Marchetti* did not mean to discard the distinction between past and future crimes in testing the availability of the privilege. To the contrary, the Court in *Freed* reaffirmed the past-future distinction and the principle that the privilege cannot be asserted to protect against incrimination for future crimes. *Freed* thus suggests that *Marchetti*'s recognition of a possible prospective content to the privilege is limited to cases in which the privilege is asserted to avoid a substantial and non-speculative risk of incrimination for future acts that are part of an ongoing criminal enterprise.[10]

In *Freed*, the Court upheld the provision of the National Firearms Act that requires a detailed report to be filed upon the transfer of certain classes of firearms. The Act provides that the information furnished in the report could not be used against either party to the transfer with respect to any present or past criminal acts. The defendant argued that even though the information in the transfer registration forms could not be used to incriminate him for present or past acts, it could be used in connection with any unlawful acts he might commit in the future and that the statutory immunity was therefore insufficient to displace the privilege. The Court rejected that argument, concluding that the threat of incrimination with respect to offenses the defendant might commit in the future was not "substantial and 'real' " (401 U.S. at 606). The defendant's argument, the Court held (401 U.S. at 606–607),

[10]The risk of incrimination in both *Freed* and the present case is different both in kind and degree from the risk of incrimination facing Marchetti. The statute at issue in *Marchetti* required professional gamblers to acquire a federal gambling tax stamp, which in turn required "the declaration of a present intent to commence gambling activities" and thus obliged "even a prospective gambler to accuse himself of conspiracy to violate either state gambling prohibitions, or federal laws forbidding the use of interstate facilities for gambling purposes." 390 U.S. at 53. Respondent's compelled grand jury testimony, by contrast, did

> assumes the existence of a periphery of the Self-Incrimination Clause which protects a person against incrimination not only against past or present transgressions but which supplies insulation for a career of crime about to be launched. We cannot give the Self-Incrimination Clause such an expansive interpretation.

The Court therefore held that the statutory immunity from the use of the registration materials to prove any past or current crimes was sufficient to overcome the defendant's assertion of his Fifth Amendment privilege.[11]

In his concurring opinion, Mr. Justice Brennan expanded on this point, noting that the privilege "does not require that immunity be given as to the use of such information in connection with crimes that the transferee might possibily commit in the future with the registered firearm." 401 U.S. at 611 (Brennan, J., concurring). The immunity in the statute, prohibiting the use of information obtained in the registration forms with respect to past crimes, is "co-extensive with the

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not require him to declare a present intent to commit perjury. His testimony became incriminating evidence of a false declarations offense only when he lied before the grand jury after he had been given immunity. The compelled disclosure in *Marchetti* could help incriminate the registrant even if he never took steps to commit any further gambling offenses. Here, by contrast, respondent's compelled testimony had no incriminating potential with respect to a perjury offense until he decided to lie and thus made it incriminating. In other words, unlike the registrant in *Marchetti*, once respondent received immunity, he "had nothing to fear from telling the truth." *United States* v. *Wilcox*, 450 F.2d 1131, 1141 (5th Cir. 1971), cert. denied, 405 U.S. 917 (1972).

[11] The Court also noted that, unlike the information in *Marchetti*, the information on the transfer form was not ordinarily made available to state and federal law enforcement agencies, 401 U.S. at 606, and for that reason as well the defendant's fear of incrimination was insubstantial.

privilege" (401 U.S. at 612), Justice Brennan concluded, and the information can therefore lawfully be compelled without violating the privilege against compulsory self-incrimination.

The past-future distinction is supported not only by the inherent speculativeness that attends most claims of possible future incrimination, but also by consideration of the policies that underlie the constitutional privilege. The privilege is in essence a shield designed to protect an actual or potential criminal defendant from having the government pry from his lips statements that could be used to convict him of crime. *Murphy* v. *Waterfront Commission, supra,* 378 U.S. at 55. It is the product of a judgment by the Framers that the distastefulness of inquisitorial practices designed to produce a suspect's confession outweighs the value to the criminal justice process of requiring an accused to account for his actions.

As applied to a future offense, however, the privilege becomes a sword rather than a shield, and the balance of interests is quite different. At the time he is granted immunity, a witness's testimony ordinarily cannot incriminate him with respect to a crime he has not yet committed. Thus, the effect of immunizing the witness from the use of his testimony to prove a subsequent offense, be it perjury or any other, is simply to permit the individual to commit that crime free of the risk that his prior testimony can be used to convict him. There is nothing in the policies underlying the privilege that would justify this kind of extension of its sweep.

3. *Respondent's receipt of immunity did not bar the use of his testimony to prove the falsity of his contemporaneous sworn statements.*

In this case, of course, respondent did not invoke the privilege on grounds of possible incrimination as to any future offense; rather, he presented a valid claim of privilege based upon the risk of incrimination as to al-

ready consummated offenses. The court of appeals held that upon making a legitimate claim of the privilege, he acquired a comprehensive immunity against any prospective use whatsoever of testimony given under compulsion.

a. We submit that the immunity respondent acquired was not so all-encompassing, but instead was precisely co-extensive with the scope of the privilege available to him at the time his testimony was compelled. The Constitution does not require that the grant of immunity protect a witness from dangers that fall outside the protection of the privilege. *Ullmann* v. *United States*, 350 U.S. 422, 430–431, 438–439 (1956); *Heike* v. *United States*, *supra*, 227 U.S. at 142–143, Korman, *The Use of Testimony Compelled Under a Grant of Use Immunity*, 44 Brooklyn L. Rev. 935, 940 (1978).[12] Thus, the legitimacy of any proposed use of the compelled testimony can be ascertained by determining whether, at the time he was called upon to give that testimony, the witness could successfully have invoked his privilege to guard against that use. If he could, then by compelling the testimony over a claim of the privilege, the government forgoes the ability to make that use of the tes-

[12] For example, a witness cannot assert the privilege to escape liability in a civil suit, or disgrace in the community, or even the loss of a job or some other non-criminal sanction. *Gardner* v. *Broderick*, 392 U.S. 273, 279 (1968); *Uniformed Sanitation Men Ass'n* v. *Commissioner of Sanitation*, 392 U.S. 280, 284–285 (1968); VIII J. Wigmore, *Evidence*, *supra*, at §§2254-2255. He cannot even assert the privilege because he fears for his life if he testifies. *Piemonte* v. *United States*, 367 U.S. 556, 559 n.2 (1961); *In re Grand Jury Procedings*, 509 F. 2d 1349, 1352 (5th Cir. 1975). It is therefore unnecessary for the grant of immunity to protect against those consequences in order to displace the privilege. *Ullmann* v. *United States*, *supra*, 350 U.S. at 430-431; *Smith* v. *United States*, 337 U.S. 137, 147 (1949); *Brown* v. *Walker*, *supra*, 161 U.S. at 605-606. Rather, the privilege extends only to possible incrimination in a criminal case.

timony. On the other hand, if the use that the government proposes to make of the immunized testimony could not have been adduced as a valid basis for claiming the privilege, the immunity does not protect against that use.

In the present case, respondent was privileged to decline to testify with regard to his dealings with Brown, his travels to Florida, or his interview with the FBI. For that reason, the grant of immunity under which his grand jury testimony was compelled precludes the use of his testimony or its fruits to help convict him of offenses arising out of any of the activities about which he was questioned before the grand jury. See *New Jersey* v. *Portash*, No. 77-1489 (Mar. 20, 1979), slip op. 7.

Similarly, if prior to his appearance before the grand jury respondent had given a false sworn statement at a different proceeding about the matters as to which he was questioned before the grand jury, he could validly have asserted his privilege not to testify because of the risk that his truthful testimony before the grand jury would expose him to a prosecution for perjury or false declarations. See *United States* v. *Housand*, 550 F.2d 818, 823 (2d Cir.), cert. denied, 431 U.S. 970 (1977). For that reason, a grant of immunity would protect him from the use of his testimony to prove that he committed perjury during a prior proceeding. *In re Grand Jury Proceedings*, *supra*, 509 F.2d at 1351; *United States* v. *Watkins*, 505 F.2d 545, 546 (7th Cir. 1974); *United States* v. *Alter*, 482 F.2d 1016, 1028 (9th Cir. 1973).

On the other hand, if respondent had declined to testify before the grand jury on the ground that his testimony could be used against him if he should perjure himself, his claim of privilege would not have been sustained. *United States* v. *Partin*, 552 F.2d 621, 632 (5th Cir.), cert. denied, 434 U.S. 903 (1977); *United States* v. *Kirk*, 528 F.2d 1057, 1061–1062 (5th Cir. 1976); *Kronick* v. *United States*, 343 F.2d 436, 441 (9th Cir.

1965). In effect, his claim would have been that without the protection of the privilege he would not be as free to perjure himself before the grand jury, since the use of portions of his grand jury testimony might make it easier for the government to prove that other portions of his testimony were false. This impediment to respondent's ability to perjure himself in giving his immunized testimony is not a "real danger of legal detriment arising from the disclosure." *Rogers* v. *United States*, 340 U.S. 367, 372–373 (1951). A possible future act of perjury, even a planned one, is not the kind of criminal exposure that the privilege against compulsory self-incrimination was intended to reach.

Accordingly, because respondent could have expected no protection from his Fifth Amendment privilege for a possible future act of perjury, it follows that there is no constitutional barrier to the use of relevant portions of his immunized grand jury testimony, even if truthful, to establish the falsity of other portions of that testimony.

b. The court of appeals rejected this analysis. Instead, it relied on language from *Kastigar* v. *United States*, *supra*, 406 U.S. at 453, 458–459, to hold that respondent's immunized testimony could not be used for any purpose except as the *corpus deliciti* of the false statements offense. We submit that the court of appeals read *Kastigar* far too broadly.

In stating that the government could not use testimony compelled under a grant of immunity "in *any* respect" (406 U.S. at 453; emphasis in original), the Court in *Kastigar* was distinguishing between "use and derivative use" immunity, which it held constitutionally sufficient, and the more limited "use" immunity that was held insufficient in *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892). In order for the immunity to be commensurate with the privilege, the *Kastigar* Court held, the government must be denied not only the right to use compelled testimony as evidence at trial, but also

the right to use the testimony to develop leads and strengthen its case against the defendant in indirect ways.

This holding falls far short of suggesting that immunized testimony can never be used against a witness. As we have noted (see page 20 note 12, *supra*), immunized testimony can be used for a number of purposes: it can be used to prove that the testimony was perjured; it can be used against the witness in civil proceedings; and it can be used to deny the witness a job or other important benefits that he might have continued to enjoy had he remained silent. It is therefore inaccurate to say that the grant of immunity prohibits the government from making any use whatever of the compelled testimony.

What *Kastigar* establishes is that the Constitution prohibits the use of compelled testimony for any purpose as to which a claim of privilege would have been upheld. Thus, an immunized witness may be prosecuted for testifying falsely under a grant of immunity because, if he had claimed the privilege on the ground that he might lie before the grand jury, his claim would have been rejected and he could have been required to testify without immunity. In other words, an immunity grant provides the same protection against prosecution for contemporaneous perjury that the privilege does: that is, no protection at all.[13]

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[13]The Court has used similar "any use" language in *Murphy* v. *Waterfront Commission*, *supra*, and *New Jersey* v. *Portash*, *supra*, in describing the protection afforded by a grant of immunity. In *Murphy*, the Court stated that the federal government could not make "any * * * use" of testimony compelled under a state grant of immunity, referring to possible use in a federal criminal prosecution. And in *Portash*, the Court held that the prosecution could not use immunized testimony to impeach the defendant at his trial for the substantive offenses about which he had testified before the grand jury. In both cases the Court barred the use of a defendant's immunized testimony to help the

This point is perhaps best underscored by comparing the protection that respondent would have obtained under the previous system of transactional immunity with the protection that he is claiming in this case. A grant of transactional immunity provides the witness protection from prosecution for any offense about which he is required to testify. Even under transactional immunity, however, the witness enjoys no protection with respect to testimony as to which he could have asserted no privilege.

In *Heike* v. *United States*, *supra*, for example, the government granted transactional immunity to a witness in an antitrust investigation. The witness was later indicted on tax fraud charges only remotely related to the matters at issue in the antitrust investigation. The Court held that the portions of his grand jury testimony that related to the fraud charges were not incriminating and that the witness could not have made a valid claim of the privilege with respect to that testimony. Therefore, the Court held, the witness's immunity provided no protection against his subsequent prosecution for tax fraud.

The *Kastigar* Court clearly did not intend to suggest that use immunity is broader in any respect than transactional immunity. Accordingly, the statements in *Kastigar* that immunized testimony may not be used in "any way" must be interpreted to apply only to uses that the witness could have avoided by a timely assertion of the privilege.

c. The only decision of this Court that bears directly on the issue presented in this case is *Cameron* v. *United States*, 231 U.S. 710 (1914). In *Cameron* the

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prosecution establish the defendant's guilt of the same crime as to which he initially claimed the privilege and as to which his privilege was overriden by a grant of immunity. In the instant case, by contrast, the immunized testimony is being used to prove a crime that had not occurred at the time petitioner was granted immunity and as to which he then had no testimonial privilege.

defendant was indicted for committing perjury in two separate proceedings: in a hearing before a bankruptcy commissioner and in a subsequent proceeding before the bankruptcy referee. At trial, the government introduced the defendant's testimony in the proceeding before the commissioner to prove that he perjured himself in the proceeding before the referee. Considering only statutory issues, the Court held that under the applicable immunity statute, Rev. Stat. Section 860, 15 Stat. 37, the testimony given in the proceeding before the commissioner should not have been received to establish perjury in the proceeding before the referee. 231 U.S. at 724. The Court, however, rejected the defendant's alternative argument that in proving perjury in a single proceeding the government may introduce only the portion of a witness's testimony that is specifically charged as perjurious. The immunity granted by the statute, the Court noted,

> was not intended to put a premium upon perjury by giving protection against the use of the testimony in prosecutions for that crime; and we cannot agree with petitioner's contention that the use of such testimony is limited to proving that it was in fact given. In prosecutions for perjury the statute saved the right to use such testimony *for any legitimate purpose in establishing the charge made.* * * *

231 U.S. at 720–721 (emphasis added).[14]

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[14] The Court's holding that testimony in one proceeding could not be used to prove perjury in the other was based on a construction of the immunity statute and not on the Fifth Amendment. Although the statute authorized prosecutions for perjury committed under a grant of immunity, it prohibited the use of any immunized testimony "in any criminal proceeding." The Court construed the statute to permit the government to use any of the testimony in a proceeding to prove perjury in that proceeding, but not to use the statements to prove perjury in the other proceeding. The Court made it clear that its ruling was based on a construction of the applicable immunity statute, and not on any constitutional prohibition. See 231 U.S. at 721, 724.

To be sure, the ruling that immunized testimony could lawfully be used "for any legitimate purpose" to prove perjury in the same proceeding was dictum. Yet it was carefully considered dictum, based on contemporaneous decisions by two courts of appeals in *Daniels* v. *United States*, 196 F. 459, 462–463 (6th Cir. 1912) and *Edelstein* v. *United States*, 149 F. 636, 642-644 (8th Cir. 1906).[15] In both of those cases, the courts held that the immunity granted to the defendant was coextensive with the constitutional privilege and that it therefore provided no protection in prosecutions for perjury committed under the grant of immunity. In *Daniels*, the court observed that the Fifth Amendment privilege "can have reference only to crimes which have already been committed at the time when the evidence is compelled," and that the statutory immunity therefore "does not have reference to any criminal proceeding based on a crime inherent in the bankrupt's examination." 196 F. at 463. Accordingly, the court concluded, "where the bankrupt is indicted for testifying falsely in one part of his examination, his testimony in other parts of the same examination, if tending to support the indictment, may be given in evidence against him." *Ibid.*

More recently, several other courts of appeals, in dictum, have agreed with the approach taken by the court of appeals in this case. Both *United States* v. *Berardelli*, 565 F.2d 24 (2d Cir. 1977), and *United States* v. *Patrick*, 542 F.2d 381 (7th Cir. 1976), cert. denied, 430 U.S. 931 (1977), were appeals by witnesses who had been held in contempt for refusing to testify at trial, despite a grant of immunity. In both cases, the witnesses sought to justify their refusal to testify on the ground that their answers, if inconsistent with testimony they had given in a prior grand jury proceeding, might be used to convict them of making false declarations under the inconsistent statements theory of proof set out in 18 U.S.C. 1623(c). In *United States* v. *Housand*, 550 F.2d 818 (2d Cir.), cert. denied, 431 U.S. 970 (1977), a prospective defense witness who had earlier testified before the grand jury under a grant of immunity refused, in the absence of a new grant of immunity, to testify at trial. The witness's refusal was upheld by the district court, and the defendant challenged the correctness of that ruling on appeal.

[15] The two court of appeals cases were cited to the *Cameron* Court, together with *Glickstein* and a district court case, *United States* v. *Brod*, 176 F. 165 (N.D. Ga. 1912). See 231 U.S. at 713.

The contempt convictions of Patrick and Berardelli were affirmed, while Housand's claim was rejected. Each opinion explicitly, although unnecessarily and with little supporting analysis, stated that no incriminating use of any kind could be made of truthful immunized testimony, even to prove a later perjury. See also *United States* v. *Dunn*, 577 F.2d 119, 125-126 (10th Cir. 1978), rev'd on other grounds, No. 77–6949 (June 4, 1979).

The results in *Berardelli*, *Housand*, and *Patrick* were correct without regard to their dicta and are not inconsistent with the result we urge in this case. In each of those cases, the witness, having previously testified, was called to testify on the same subject in a second proceeding. In each case, he invoked his privilege in the second proceeding on the ground that his truthful testimony on that occasion might tend to establish the falsity of his prior testimony, thereby incriminating him. Each invocation of the privilege was plainly proper and foreclosed the compulsion of testimony without a grant of immunity. In each instance, moreover, the grant of immunity would have precluded the use of the testimony at the second proceeding to establish the falsity of the prior testimony, whether pursuant to an inconsistent statements theory or otherwise. Since this is so, there was no necessity for the courts to express any view about the use that might be made of any im-

munized testimony, truthful or otherwise, given during an earlier proceeding.

In the instant case, by contrast, respondent invoked the privilege and was granted immunity prior to his appearance before the grand jury. The immunity he was granted at that time protected him against the use of his testimony to prove any prior offense. Unlike the witnesses in *Berardelli*, *Housand*, and *Patrick*, respondent was not summoned to testify in a subsequent proceeding, and he did not assert his privilege anew at any point in the course of his grand jury testimony. Accordingly, the immunity granted at the outset of the grand jury proceeding did not protect him against the use of his testimony to prove any offenses he might have committed in the course of that testimony, including perjury.

d. The competing analysis employed by the court of appeals is unsatisfactory. The court began with the proposition that untruthful immunized testimony is not constitutionally protected (Pet. App. 13a). That much, of course, is correct. See *United States* v. *Dunn*, *supra* 577 F.2d at 125–126; *United States* v. *Moss*, 562 F.2d 155, 165 (2d Cir. 1977), cert. denied, 435 U.S. 914 (1978); *United States* v. *Tramunti*, *supra*, 500 F.2d at 1343-1344; cf. *United States* v. *Kahan*, 415 U.S. 239 (1974). However, the court's further suggestion that *only* false testimony is unprotected by the grant of immunity (see Pet. App. 13a–14a) is unworkable for several reasons.

First, as we have shown above, truthful immunized testimony may be used for any purpose not protected by the privilege that the grant of immunity displaced. Moreover, in a perjury prosecution, the allegedly false testimony is not established as false prior to the jury's verdict. Thus, under the court's analysis, immunized testimony may be "used" against a defendant absent any prior showing that it is false. And if the defendant is acquitted, the immunized testimony will have been

used against him without any showing of falsity at all.[16] Finally, even if it were correct that only false immunized testimony is admissible in a perjury prosecution, the standard of admissibility adopted by the court of appeals is inconsistent with that principle. Although the court of appeals at one point appeared to restrict the government to introducing only those statements specifically charged as the *corpus delicti* of the false statements prosecution (Pet. App. 11a–12a), it subsequently stated that the government may introduce not only the statements charged to be false, but also "that minimal testimony *essential* to place the charged falsehood into its proper context" (*id.* at 14a n.9) (emphasis in original).

Thus, the court of appeals acknowledged that some truthful immunized testimony may be introduced in a perjury prosecution. But with that provision, the court in effect erected a novel and exacting standard of relevancy for introducing truthful immunized testimony. The testimony must do more than simply tend to prove some element of the offense, see Fed. R. Evid. 401. It must be "essential" to place the alleged falsehood "into its proper context." Aside from the problems that would face a district court in trying to determine whether particular testimony was sufficiently "essential," or whether the testimony went beyond simply providing "context" for the alleged falsehood, there is no constitutional basis for the court's test. If the defendant is constitutionally protected against the use of truthful immunized testimony, he is protected against its use regardless of whether it is "essential" and regardless of whether it places other testimony "in context." And if the testimony is unprotected, as we contend, it may be used as long as it satisfies the ordinary test of relevancy.

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[16] The Second Circuit has acknowledged this problem. See *United States* v. *Anzalone*, 555 F.2d 317, 320 (2d Cir. 1977); *United States* v. *Moss*, *supra*, 562 F.2d at 165.

C. The Federal Immunity Statute Does Not Prohibit the Use of Truthful, Immunized Testimony to Prove the Falsity of Contemporaneous Non-immunized Testimony

The federal immunity statute, 18 U.S.C. 6002, expressly permits the use of immunized testimony in "a prosecution for perjury [or] giving a false statement." Moreover, it is beyond serious dispute that the statutory reference to prosecutions for "giving a false statement" includes prosecutions brought under 18 U.S.C. 1623, the federal false declarations statute. See *United States* v. *Anzalone*, *supra*. On its face, therefore, the immunity statute poses no obstacle to the use of immunized testimony that was made in this case.

Although the court of appeals held that the introduction of respondent's immunized testimony violated the immunity statute as well as the Constitution (Pet. App. 14a & n.9), it did not analyze the statutory point separately or suggest any specific basis for concluding that the statute supplied independent grounds for exclusion of the evidence. Instead, it simply regarded the immunity conferred by the statute as being coextensive with that required by the Constitution. We agree that the statutory and constitutional protections are coextensive, but because we contend that the Constitution permits the use of immunized testimony that was made in this case, it follows that the statute permits that use as well.

1. *The legislative history of the immunity statute shows that Congress intended to provide only such immunity as is constitutionally required.*

The federal immunity statute, 18 U.S.C. 6002, was enacted as part of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, Section 201(a), 84 Stat. 927. It was drafted in response to a reexamination of the constitutional principles applicable to immunity, prompted in part by the decision in *Murphy* v. *Waterfront Commission*, *supra*, which indicated that con-

temporary federal immunity statutes that granted broad transactional immunity provided more protection than was required by the Constitution. See *Kastigar* v. *United States*, *supra*, 406 U.S. at 452 & n.36. In both the Senate and House reports on the proposed legislation, it was made clear that the purpose of the new provision was to narrow the scope of a grant of immunity to precisely what the Constitution requires, and no more:

> This statutory immunity is intended to be as broad as, but no broader than, the privilege against self-incrimination. * * * It is designed to reflect the use-restriction immunity concept of *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964) rather [than] the transaction immunity concept of *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892).

S. Rep. No. 91-617, 91st Cong., 1st Sess. 145 (1969); H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 42 (1970). See also S. Rep. No. 91-617, *supra*, at 107-108 (comments of Department of Justice).

The proposal for the federal use immunity statute derived from a 1969 report of the National Commission on the Reform of the Federal Criminal Laws. See II *Working Papers of the National Commission on Reform of Federal Criminal Laws* 1445-1448 (1970). The report proposed a general federal use immunity statute under which "the immunity conferred would be confined to the scope required by the Fifth amendment" (*id.* at 1405). See also *Measures Relating to Organized Crime: Hearings on S. 30, etc., Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 15, 326 (1969) (hereafter "Senate Hearings").

The statements of the sponsors of the bill, like the comments in the House and Senate Reports, reflect a general understanding that the bill would restrict the immunity conferred under its provisions to that required by the Constitution. Senator McClellan, the

chief sponsor of the bill in the Senate, emphasized that the bill was designed to provide only the minimum required immunity. "Giving immunity where it is not necessary," he stated, "is giving an unnecessary gratuity to a crime, a step no sane society ought ever to take." 115 Cong. Rec. 5879 (1969). Representative Poff, the chief sponsor in the House, observed that the bill would give a witness "all that is guaranteed him under the Constitution" (116 Cong. Rec. 35291 (1970)). Quoting Mr. Justice White's observation in *Murphy* v. *Waterfront Commission*, *supra*, 378 U.S. at 107, he added that " '[i]mmunity must be as broad as, but not harmfully and wastefully broader than, the privilege against self-incrimination' " (116 Cong. Rec. 35291 (1970)).

These legislative materials make it clear that Congress did not intend to grant any broader protection to an immunized witness than is required by the Constitution. Both this Court and others have agreed that the immunity provided in Section 6002 "is coextensive with the scope of the privilege against self-incrimination" (*Kastigar* v. *United States*, *supra*, 406 U.S. at 453) and that Congress intended "to restrict the scope of immunity authorized by the statute to that which is constitutionally required" (*In re Daley*, 549 F.2d 469, 477 (7th Cir.), cert. denied, 434 U.S. 829 (1977)). See also *United States* v. *Trammel*, 583 F.2d 1166, 1168 (10th Cir. 1978), cert. granted No. 78-5705 (Feb. 2, 1979); *Childs* v. *McCord*, 420 F. Supp. 428, 431 (D. Md. 1976), aff'd, 556 F.2d 1178 (4th Cir. 1977). The statute therefore should not be construed to impose any additional and more stringent limitation than the Constitution demands on the uses to which immunized testimony may be put.[17]

[17]The reference to "a prosecution for perjury, giving a false statement, or otherwise failing to comply with the [immunity] order" was not intended to constitute an exhaustive list of permissible uses for immunized testimony. The list of exceptions to the general rule barring the use of immunized testimony was added for quite the opposite reason: to forestall a construction that would unnecessarily restrict the uses to which immunized testimony could be put. As both the Senate and House reports stated: "The exception for perjury, false statements or other failure to comply with the order is probably unnecessary. * * * It is included out of caution to insure that such immunity is not given." S. Rep. No. 91-617, *supra*, at 145; H.R. Rep. No. 91-1549, *supra*, at 42. Congress thus assumed, in accordance with decisions of this Court, that the ostensibly restrictive language of use immunity statutes would not preclude uses of immunized testimony that are consistent with the Constitution. See *United States* v. *Bryan*, *supra*, 339 U.S. at 338-340; *Heike* v. *United States*, *supra*, 227 U.S. at 141; *Glickstein* v. *United States*, *supra*.

2. *Congress intended the false declarations statute to provide an effective instrument for prosecuting persons for making false statements under a grant of immunity.*

The false declarations statute, 18 U.S.C. 1623, like the federal use immunity statute, was enacted as part of the Organized Crime Control Act of 1970.[18] It was designed to facilitate proof of false swearing by doing away with several common law rules of evidence that traditionally had applied to prosecutions under the federal perjury statute, 18 U.S.C. 1621. See *Dunn* v. *United States*, *supra*. In order to facilitate prosecutions for false swearing before or ancillary to a grand jury or a court, Congress made the common law rules such as the two-witness rule and the direct-evidence rule inapplicable to prosecutions under Section 1623. This step, it was thought, would result in "greater assurance that testimony obtained in grand jury and court proceedings will aid the cause of truth." S. Rep. No. 91-617, *supra*, at 57-59; see also H.R. Rep. No. 91-1549, *supra*, at 33. In addition, in order further to ease the traditional difficulties faced by the prosecution in perjury cases, Con-

[18]The immunity provisions were contained in Title II of the Act, while the false declarations statute was contained in Title IV, Pub. L. No. 91-452, Section 401(a), 84 Stat. 932.

gress provided that contradictory statements under oath could supply the basis for a perjury prosecution without specific proof of the falsity of one of the statements. 18 U.S.C. 1623 (c); S. Rep. No. 91-617, *supra*, at 58.

One of the main reasons that Congress sought to facilitate prosecutions for false swearing was to provide meaningful sanctions to ensure that immunized testimony would be truthful. See S. Rep. No. 91-617, *supra*, at 57-58. The prospects for perjury prosecutions under the transactional immunity statutes then in force were viewed as poor, and the likelihood of conviction low. *Id.* at 57. In explaining the liberalized provisions for proving a false declarations offense, Senator McClellan, the chief sponsor of the bill in the Senate, observed (115 Cong. Rec. 5880 (1969)):

> A subpoena can compel the attendance of a witness before a grand jury or at trial. An immunity grant can displace his privilege against self-incrimination. The threat of imprisonment for civil contempt can legitimately coerce him into testifying. But only the possibility of a perjury prosecution, or some related sanction, can provide any guarantee that his testimony will be truthful.

Similarly, Representative Poff, the chief sponsor in the House, emphasized that the provision in the statute facilitating the proof of false declarations would be equally applicable to prosecutions involving immunized testimony (116 Cong. Rec. 35,292 (1970)):

> The integrity of the criminal trial depends upon the power to compel truthful testimony and to punish falsehood. Witness immunity such as title II will provide can be an effective prosecutive weapon only if the immunized witness testifies truthfully. The infrequency of the use of perjury sanctions—due to the difficulty of securing convictions under existing law—has limited the effectiveness of established criminal sanctions for false statements under oath.

Thus, far from intending to exclude the use of compelled testimony in false declarations prosecutions, Congress was concerned with guaranteeing the truthfulness of all types of formal testimony, including that of immunized witnesses, when it introduced the liberalized proof provisions embodied in Section 1623.

Accordingly, the federal immunity statute should be read, consistently with the Constitution, to permit the use of relevant immunized testimony to prove false swearing committed under the grant of immunity.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-972

UNITED STATES OF AMERICA,
Petitioner

v.

STANLEY APFELBAUM,
Respondent

BRIEF FOR RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-972

UNITED STATES OF AMERICA,
Petitioner

v.

STANLEY APFELBAUM,
Respondent

BRIEF FOR RESPONDENT

QUESTION PRESENTED

Whether the government is permitted unrestricted use of a grand jury witness' truthful immunized testimony at the trial of that witness for false swearing when such statements have not been charged as the *corpus delecti* of the false statements offense and have never been shown to be false by the government.

STATEMENT OF THE CASE

From 1974 to 1977 respondent, Stanley Apfelbaum, was employed as the Administrative Assistant to the then District Attorney of Philadelphia, F. Emmett Fitzpatrick. During 1976, a federal grand jury in the Eastern District of Pennsylvania was investigating potential federal violations stemming from a staged robbery on April 16, 1975 of a Chestnut Hill Lincoln-Mercury dealership in Philadelphia operated by Harry Brown and Marvin Greenblatt. During the course of the grand jury investigation, Mr. Apfelbaum was subpoenaed to testify to determine whether he was an aider and abettor or accessory after the fact to the staged robbery. Respondent invoked his Fifth Amendment privilege and on October 20, 1976 the United States District Court for the Eastern District of Pennsylvania (Broderick, J.) entered an Order under Title 18 U.S.C. §6002 immunizing Mr. Apfelbaum's testimony and compelling him to testify (A. 5-6). Respondent initially refused to testify, was held in civil contempt under 28 U.S.C. §1826 and confined for six days. Thereafter, on December 13, 1976 and January 3, 1977, respondent purged himself of the contempt by appearing before the grand jury and, pursuant to the immunity Order, answering the questions of his two interrogators from the United States Department of Justice. He was asked a wide range of questions about his knowledge of and relationship to Brown, Greenblatt and the automobile dealership.

In July, 1977, Mr. Apfelbaum was indicted by the federal grand jury and charged in two counts with knowingly making false material statements to the investigating grand jury, in violation of 18 U.S.C. §1623[1] (A. 7-19). The testimony alleged be false in both counts was very specific. Count One charged that Mr. Apfelbaum was not truthful when he denied trying to locate Harry Brown in Florida in December, 1975. The alleged false testimony contained in Count

---

[1] Title 18, United States Code, §1623, reads in pertinent part as follows:

> "Whoever under oath . . . in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both."

The same grand jury initially indicted respondent in April 1977 on three counts of making false declarations before the grand jury. Counts One and Two of the July, 1977 indictment contain the same testimony alleged to be false in Counts One and Two of the April, 1977 indictment. The April, 1977 indictment was dismissed by the district court because it failed to specify the materiality of Mr. Apfelbaum's testimony. Count Three also suffered from such vagueness that no conviction thereunder could ever be sustained (Pet. App. 7a, n.4).

At trial on the two counts contained in the July, 1977 instant indictment, the government established the materiality of respondent's testimony to the grand jury investigation through the testimony of the deputy forelady of the grand jury (Tr. 3-27, 31-32). The district court held as a matter of law that the pertinent questions and answers were material to the grand jury's investigation.

One given during respondent's December 13, 1976 grand jury appearance was as follows: (A. 13-14):

Q. It's my understanding you went down to Florida in December of 1975, approximately the 5th of December.

A. That's right. That's what I said before.

Q. Now, at that time did you see Mr. Brown?

A. No, I told you I went down there for a fishing trip, not fishing trip, to look at a boat for Dr. Slawek and then go to Puerto Rico.

Q. And you only stayed in Florida about three days?

A. About three or four days, something like that. I'm not sure exactly. Don't hold me to three or four. It was around that. I spent a total time of about two weeks between the two, including flight time and so on.

Q. When you were down there, did you call up Harry Brown and talk to him?

A. No.

Q. Did you know he was down there?

A. I heard he was down there. Somebody had said he was down there.

Q. Did you do anything to attempt to contact Mr. Brown when you were down there?

A. Not that I remember. I don't think I knew where he was at.

Q. Well, how did you find out where he was at eventually?

A. Somebody had told me about it and I don't know who, but they told me he was down in Florida.

Q. Okay. By this time, had the papers reported that Harry Brown was missing?

A. I don't believe so. I don't know. I'm not sure. I'm trying to recollect. I don't know whether they said he was missing or not.

Q. So, in December, when you were down there, you're sure you didn't try to contact Harry Brown; is that correct?

A. Yeah, yeah.

Q. Did you try to locate Harry Brown when you were down there?

A. No.

Q. You're sure?

A. Positive.

Q. Now, did you tell anyone that you were trying to locate Harry Brown in Florida?

A. Not that I remember.

Q. And, you know, you were on your vacation and you were looking at boats, so you weren't running around trying to find somebody you didn't know where they were, is that correct?

A. Yeah.

Q. And you would remember that?

A. Yeah, I think I would.[2]

[2] Before trial, respondent filed a Motion for a Bill of Particulars requesting the government to state specifically with respect to each count: a) which of the answers is the false declaration not believed to be true, and b) the particular facts on which the government relies in support of the allegations that the quoted portions of the testimony were false. The government never filed an answer to the Motion for a Bill of Particulars. However, at a pretrial hearing on August 25, 1977, the district court indicated upon inquiry of defense counsel that the specific answers alleged to be false in Count I are as follows (Tr. 26):

Count Two charged that Mr. Apfelbaum was not truthful when he denied telling F.B.I. agents that he had lent $10,000 to Harry Brown. The alleged false testimony contained in Count Two given during respondent's December 13, 1976 and January 3, 1977 grand jury appearances was as follows (A. 15-17):

(Testimony of December 13, 1976)

Q. Did you ever tell anyone that you had lent any money to Harry Brown or Marvin Greenblatt?

A. No, sir.

Q. Did you ever tell anyone that you had been involved in a loan to Harry Brown or Marvin Greenblatt?

A. No, sir.

Count I

Q. Did you try to locate Harry Brown when you were down there?

A. No.

Q. You're sure?

A. Positive.

Q. You never told anyone that you had been involved in any kind of loan to Harry Brown?
A. No.

* * *

(Testimony of January 3, 1977)
Q. Did you ever tell the F.B.I.—you denied last week that you told anyone that you had lent money to Harry Brown?
A. That's right.
Q. You denied that?
Q. How could I lend money when I don't have any money myself, Mr. Friedman?
Q. So, you didn't tell the F.B.I. or anyone that you had lent money to Harry Brown?
A. No, sir.
Q. Is that right?
A. That's right.

* * *

Q. Now, sir, in 19-- what, 1975, and 1976, did you have $10,000?
A. Did I what?
Q. Have $10,000?
A. I told you I didn't have $10,000.
Q. And, you didn't lend $10,000 to Harry Brown, is that right?
A. No, sir.
Q. And you testified that way last week?
A. Yeah.

Q. You testified last week that you never told anyone that you had lent $10,000 to Harry Brown; is that right?
A. That's right, sir.
Q. Okay. And, you still persist in that testimony.
A. Uh-huh. How can I lend it to him when I didn't have it? I had to go to the bank and borrow money myself.
Q. You still persist in that testimony?
A. Yes, sir.
Q. You never told the F.B.I. that you lent Harry Brown $10,000; is that right?
A. If I did, it was ridiculous.
Q. Did you tell them that?
A. I don't know. I don't think I did.
Q. Do you have any recollection of telling them that?
A. No, no, sir.[3]

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[3] At the same August 25, 1977 pretrial hearing, the court indicated in response to the Motion for a Bill of Particulars that the specific answers alleged to be false in Count Two are as follows (Tr. 19-20, 23, 49):

Q. So you didn't tell the F.B.I. or anyone that you had lent money to Harry Brown?

A. No, sir.

* * *

At trial, the government proved the falsity of the testimony contained in Count One with four witnesses from Florida (Tr. 135-139, 143-147, 148-153, 156-160, 164-170) and two bank employees from Philadelphia.

The evidence established that from December 5-10, 1975 respondent stayed at the Pier 66 Hotel in Fort Lauderdale, Florida and gave his address as the District Attorney's office in Philadelphia. Pier 66 is a hotel and marina complex in Fort Lauderdale which is known as the "Venice of America".

While in Florida, respondent visited the Blair Middle School located five miles west of Fort Lauderdale. His purpose was to find Harry Brown, the father of Lisa Brown, a student at the school. Mr. Apfelbaum first spoke with James Caplinger, a director of guidance and counselling, and displayed identification from the prosecutor's office in Philadelphia. School policy prohibited Caplinger from giving respondent information.

Q. You never told the F.B.I. that you lent Harry Brown $10,000; is that right?

A. If I did, it was ridiculous.

Q. Did you tell them that?

A. I don't know. I don't think I did.

Q. Do you have any recollection of telling them that?

A. No, no, sir.

Respondent next spoke with Joseph Grealy, an administrative assistant, who instructed his associate, Charlotte Walker, to look into the matter. At this point, respondent could not give a telephone number where he could be reached because he was on the run, not staying at one place, and was eventually going to Puerto Rico. Mr. Apfelbaum later explained the situation to Mrs. Walker, who called him back at Pier 66 and said she was unable to contact the Browns.

Claude Becker testified that he was an assistant treasurer of Advanced Mortgage Company, which made a V.A. mortgage loan to Harry Brown. In December, 1975, Mr. Apfelbaum telephoned him, said he was from the D.A.'s office in Philadelphia and requested information as to where he could reach Harry Brown. Becker declined to give out this information.

Philadelphia bank employees John Orem and John Scheuren testified that in early December, 1975 Mr. Apfelbaum informed them that he was taking a Florida vacation and would meet with Harry Brown (Tr. 189, 229).[4]

With regard to the second Count, two F.B.I. agents testified that on March 16, 1976 they interviewed

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[4] Over defense objection, the prosecution showed at trial that in February, 1975 Brown and Mr. Apfelbaum applied for a $10,000 loan through Orem, a banker with whom Brown was friendly. The loan was made in the name of the Philadelphia District Attorney and his wife (Tr. 204, 298). In March, 1975, $10,000 was credited to a checking account and the following

respondent, who said that on the previous Sunday, March 14, 1976, he returned from Fort Lauderdale, Florida where he met with Harry Brown. Mr. Apfelbaum also said he was in Fort Lauderdale in December, 1975 making inquiries as to the whereabouts of Harry Brown for the personal reason he loaned Harry Brown $10,000 and that he was a co-signer of a loan.[5] He also indicated that the loan arrangement was an "extremely complicated arrangement". Respondent was paying the loan himself and wanted to locate Harry Brown to get his money back (Tr. 300-308, 325-330).

In addition to offering this evidence to contradict Mr. Apfelbaum's specific testimony claimed to be false in Counts One and Two, the government introduced during its case in chief not only the false statements alleged in the indictment (A. 45-56, 32, 60, 62), but also, over defense objection, truthful excerpts taken from the transcripts of respondent's grand jury testimony of December 13, 1976 and January 3, 1977.

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week checks for $9,500 and $475 were drawn from the account and cashed by Brown (Tr. 226-229, 231-235). Thereafter, interest payments were made by respondent and about thirteen months later, the District Attorney himself repaid the loan (Tr. 231-235, 290).

[5] This testimony of the two F.B.I. agents was also relevant to the charges contained in Count One.

As summarized by the Court of Appeals, these excerpts included, *inter alia*:[6]

> "... (1) the degree of friendship between Apfelbaum and Brown (App. 96a-98a); (2) the circumstances surrounding Apfelbaum's discovery of, and visit to, Brown in Florida in 1976 (App. 107a, 110a, 124a-29a); (3) whether Apfelbaum and Brown discussed any loan transactions while in Florida (App. 112a); (4) whether Brown "patted down" Apfelbaum for weapons during his visit, or merely hugged him (App. 113a); (5) Apfelbaum's denial that he ever engaged in financial transactions with the Chestnut Hill dealership other than a $500 loan (App. 114a); (6) Apfelbaum's denial that he ever co-signed a loan for Brown (App. 115a); (7) a statement that Apfelbaum was introduced to one John Orem by Harry Brown (App. 116a) ..."

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[6] These excerpts appear in the Government's Appendix filed in this Court (A. 52, 57-61 and 64-67). "App." referred to by the Third Circuit are the pages of Mr. Apfelbaum's Appendix filed in the Court of Appeals.

At trial, the excerpts of respondent's grand jury testimony of December 13, 1976 introduced during the prosecution's case in chief were marked Exhibit G-1. The excerpts of respondent's grand jury testimony of January 3, 1977 were marked Exhibit G-2. The trial judge's copy of Exhibits G-1 and G-2 were marked Exhibits C-2 and C-3. These latter two exhibits contain, with a few exceptions (A. 20-21), a pink line in the margin reflecting the immunized grand jury testimony that respondent opposed the prosecution using at trial.

Other truthful excerpts introduced by the government over defense objection included respondent's testimony that Mr. Fitzpatrick never co-signed any loans for respondent, but that such loans were signed by himself or his wife (A. 38); that respondent attended a birthday party for Brown (A. 52); that Fitzpatrick was Brown's lawyer in the past (A. 67); and that respondent knew Brown because respondent would bring in the District Attorney's car to Brown's dealership for servicing (A. 68).

These various excerpts taken from Mr. Apfelbaum's immunized testimony were truthful statements made to the grand jury[7] and obviously relied upon by the government as substantive evidence to convict respondent. The jury found him guilty on both counts (A. 4) and the district court sentenced him to concurrent terms of two years imprisonment (A. 4).

The Court of Appeals reversed, relying not only on its earlier decisions in *United States* v. *Hockenberry*, 474 F.2d 247 (3d Cir. 1973) and *United States* v. *Frumento*, 552 F.2d 534, 541-543 (3d Cir. 1977) (en banc), but also upon the requirements of the Fifth Amendment to the United States Constitution and *Kastigar*

[7] The district court was under the mistaken impression that this testimony was false and was being introduced by the government to shown a pattern of deceit by respondent to prove he knowingly lied (A. 23, 78-79). The prosecution "doubted" the truthfulness of the testimony, but the record herein is totally devoid of any evidence to prove that such testimony was false.

v. *United United States*, 406 U.S. 441 (1972). The court held that grand jury testimony which is compelled under a grant of immunity may be utilized only as the *corpus delecti* or core of an indictment for perjury or for false swearing (Pet. App. 2a). *Corpus delecti* was defined to mean only the statement or statements of the defendant which the grand jury has charged to be perjurious, together with no more than that minimal testimony *essential* to place the charged falsehood into its proper context (Pet. App. 14a, n.9). (Emphasis in original). Any other use of testimony compelled under a grant of "use and fruits" immunity conferred under 18 U.S.C. §6002 would not afford the witness the same protection he would have received by invoking his privilege. Thus, "the proper remedy in the situation where the government believes that immunized statements are false is not to disregard the immunity grant but rather is to prosecute the perjurious witness" (Pet. App. 17a).[8]

[8] Respondent raised other points in support of reversal in the court of appeals, one of which related to a jury instruction on the mental state "knowingly", a critical element of 18 U.S.C. §1623. The district court here improperly instructed the jury that "unless the evidence points otherwise", a jury may infer that "one intends all the natural and probable consequences of an act". The use of this charge was disapproved by the Third Circuit in *United States* v. *Garrett*, 574 F.2d 778 (3d Cir.), *cert. denied*, 436 U.S. 919 (1978). A similar instruction was held to violate the Fourteenth Amendment's requirement that the State prove every element of a criminal charge beyond a reasonable doubt in *Sandstrom* v. *Montana*, ___ U.S. ___, 47 U.S.L.W. 4719 (June 18, 1979).

SUMMARY OF ARGUMENT

1. The Fifth Amendment broadly provides that no person shall be compelled to be a witness against himself in a criminal case. A witness who invokes the privilege can, nevertheless, be compelled to testify if he is granted "use or fruits" immunity in exchange for his testimony. To be coextensive with the constitutional privilege, a defendant's compelled statements may not be put to any testimonial use whatever against him in a criminal trial.

The purpose of affording the government the tool of immunizing a witness is to force him to testify truthfully. Thus, the government is precluded from making any use of truthful compelled testimony against the defendant at a criminal trial, or else the witness and the government are not in substantially the same position as if the witness had been allowed to remain silent. But for the immunity grant, the truthful testimony would not be in existence or available to the government to use against the witness. This insures that a witness has nothing to fear from telling the truth.

False immunized testimony has no Fifth Amendment protection whatever. Accordingly, a witness compelled to testify before a grand jury under grant of immunity who testifies falsely may be prosecuted for perjury or making false statements. The statements alleged to be false by the grand jury can be used for the limited purpose of being included in the

indictment as the *corpus delecti* or core of the false swearing charge.

Since the witness is being compelled to testify and may no longer rely upon his Fifth Amendment right to remain silent, the government has the burden of establishing the falsity of the grand jury testimony. In this case, the government never established that excerpts of respondent's compelled testimony used by the government substantively against him at trial were false.

2. The courts of appeals differ over the permissible uses of false compelled testimony. The court of appeals held in this case that the false testimony can only be used as the *corpus delecti* of a false swearing charge. Other courts of appeals have allowed the government to make broader uses of false compelled testimony at a criminal trial as, for example, to impeach the defendant or to show prior acts. Under any test of the permissible use of false compelled testimony, the failure of the government in the instant case to establish the falsity of portions of respondent's testimony read to the jury barred them from using such testimony against him in any respect. The use of such truthful testimony at trial violated respondent's Fifth Amendment rights requiring that a new trial be granted.

3. The legislative history of the false declaration and immunity statutes shows that the purpose of these two enactments was to encourage and induce

truthful testimony and to ease the prosecution for giving false testimony. This distinction between truthful and false testimony is consistent with the holding of the court of appeals which allows the government to prosecute a witness for testifying falsely, but bars them from ever using truthful testimony against the witness. Thus, the immunity grant is not disregarded and the perjurious witness is prosecuted.

ARGUMENT

RESPONDENT'S FIFTH AMENDMENT RIGHTS WERE VIOLATED WHEN THE GOVERNMENT INTRODUCED DURING ITS CASE IN CHIEF TRUTHFUL PORTIONS OF HIS GRAND JURY TESTIMONY COMPELLED UNDER A GRANT OF IMMUNITY TO PROVE THAT HE KNOWINGLY MADE FALSE STATEMENTS

A. Any Use of Truthful Immunized Testimony by the Government Against the Speaker Renders the Immunity Grant Less Than Coextensive with the Fifth Amendment Privilege It Displaces.

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself". The privilege "assures that a citizen is not compelled to incriminate himself by his own testiminy, . . . [and] usually operates to allow a citizen to remain silent when asked a question requiring an incriminatory answer". *Kastigar* v. *United States,* 406 U.S. 441, 461 (1972).

In *Tehan* v. *United States,* 382 U.S. 406, 415 (1966), the Court stated that:

> ". . . basic purposes that lie behind the [Fifth Amendment] privilege against self-incrimination do not relate to protecting the innocent from conviction, but rather to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder the entire load'."

In order to balance this Fifth Amendment requirement that the prosecution "shoulder the entire load" with the right of the grand jury to "every man's evidence" *United States* v. *Mandujano,* 425 U.S. 564, 571 (1976), the concept of "use and fruits" immunity evolved resulting in the promulgation in 1970 of 18 U.S.C. §6002, the federal immunity statute. In *Kastigar* v. *United States, supra,* the court held that immunity from "use and derivative use" under 18 U.S.C. §6002 was coextensive with the scope of the Fifth Amendment constitutional privilege against self-incrimination and was, therefore, constitutionally sufficient to compel testimony over a claim of privilege. As Mr. Justice Powell stated in *Kastigar* at p. 453:

> "Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." (Emphasis in original).

When a witness' claim of privilege is set aside under an order of immunity and he is forced to testify against his will, the exclusionary rule preventing the authorities from using the testimony or its fruits in any respect leaves the witness and the prosecutorial authorities in substantially the same position as if the witness has remained silent. *Kastigar* v. *United States, supra,* at 462; *Murphy* v. *Waterfront Comm'n.,* 378 U.S. 52, 79 (1964).

18 U.S.C. §6002 provides a "*total prohibition* or use" to insure "a comprehensive safeguard, barring the use of compelled testimony as an 'investigatory lead', and also *barring the use of any evidence* obtained by focusing investigation on a witness as a result of his compelled disclosures". *Kastigar* v. *United States, supra,* at 460. (Emphasis added). By affording this kind of protection, the statute operates after the witness has given incriminatory testimony. Id. at 461.

In *New Jersey* v. *Portash,* ___ U.S. ___, 47 U.S.L.W. 4271 (March 20, 1979), the court held that a prosecutor may not use a person's legislatively immunized grand jury testimony to impeach his credibility as a testifying defendant in a criminal case. After reviewing *Kastigar's* broad statement of the necessary constitutional scope of testimonial immunity, the court said in Portash at p. 4273:

> "The Fifth and the Fourteenth Amendments provide that no person 'shall be *compelled* in any criminal case to be a witness against himself.' As we reaffirmed last Term, a defendant's compelled

> statements, as opposed to statements taken in violation of *Miranda,* may not be put *to any testimonial use* whatever against him in a criminal trial. 'But *any* criminal trial use against a defendant of his *involuntary* statements is a denial of due process of law.' (Emphasis in original). *Mincey* v. *Arizona,* 437 U.S. 385, 398." (Footnote omitted).

Despite the broad scope of "use" immunity, a witness may still be prosecuted under certain limited conditions. Two exceptions have arisen. First, a witness may be prosecuted for substantive crimes only if the government uses evidences derived from legitimate sources totally independent of the compelled testimony. *Kastigar* at 461. Second, a witness may be prosecuted "for perjury, giving a false statement or otherwise failing to comply with the order".[9] 18 U.S.C. §6002. Respondent contends that in these prosecutions a witness' truthful compelled statements "*may not be put to any testimonial use whatever against him*". *Portash, supra,* at p. 4273.[10]

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[9] As the government notes in its Brief at pp. 32, 33, n. 17, the language "a prosecution for perjury, giving a false statement or otherwise failing to comply with the [immunity] order" was not intended to constitute an exhaustive list of permissible uses of immunized testimony. Consistent with the Constitution, compelled testimony may be used in a variety of civil, as opposed to criminal, trials or proceedings. See, i.e., *In Re Daley,* 549 F.2d 469 (7th Cir.), *cert. denied,* 434 U.S. 829 (1977).

[10] The government argues in its Brief, pp. 10-13, that it often must use a witness' truthful responses in a proceeding to prove that other testimony was false and that the witness believed that

Prior decisions of this Court reveal a commitment to preserve the integrity of the truth-seeking process by encouraging a witness to testify truthfully. Prosecutions for false swearing were permitted even when the immunity statute in question contained no express exception for prejury. See, e.g., *United States* v. *Wong*, 431 U.S. 174, 1978 (1977); *United States* v. *Washington*, 431 U.S. 181, 189 (1977); *United States* v. *Mandujano*, 425 U.S. 564, 577-578 (1976) (plurality

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his testimony was false. The context in which a witness makes a false statement, it argues, might be relevant to the issue of whether a witness "knowingly" lied. In no case cited by the government in support of this argument was the issue raised herein even considered. As *Kastigar*, *supra*, and *Portash*, *supra*, implicitly recognize, however relevant immunized testimony might be to the government's case, its use against the speaker is absolutely barred in a criminal prosecution. The holding in *Portash* bars the use of relevant compelled evidence for purposes of impeaching a testifying defendant. This exclusion of relevant evidence otherwise not available to the government but for the immunity grant is in effect the trade-off made with the witness for supplanting his Fifth Amendment privilege. Note, *State* v. *Portash—Threatening Impeachment and Influencing Defendant's Decision to Testify: Prohibited Use of Compelled Testimony*, 31 Rutgers L. Rev. 815 (1978). The rule of exclusion is not unique to evidence gathered by means of the investigative tool of an immunity grant. For instance, in situations involving evidence illegally seized in violation of the Fourth Amendment or confessions coerced in violation of the Fifth Amendment, the exclusionary rule prevents the use of probative evidence. Note, *Resolving Tensions Between Constitutional Rights: Use Immunity in Concurrent or Related Proceedings*, 76 Column. L. Rev. 674, 682 (1976).

opinion); id. at 584-585 (Brennan, J., concurring in the result); id. at 609 (Stewart, J., concurring in the result); *Glickstein* v. *United States*, 222 U.S. 139 (1911). False swearing "has no place whatever' in the "constitutional process of securing a witness' testimony". *United States* v. *Mandujano*, *supra*, at 576. "The Fifth Amendment privilege does not condone perjury; . . . [nor] endow the person who testifies with a license to commit perjury." *United States* v. *Wong*, *supra*, at 178; *accord*, *United States* v. *Knox*, 396 U.S. 77 (1969) (furnishing false information on a federal tax return in purported compliance with a statutory requirement is unprivileged.) *Bryson* v. *United States*, 396 U.S. 64, 72 (1969). ("Our legal system provides methods for challenging the government's right to ask questions—lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and wilfully answer with a falsehood.") Cf. *Garner* v. *United States*, 424 U.S. 648 (1976).

In *Kahan* v. *United States*, 415 U.S. 239 (1974), the defendant, a former immigration inspector, was convicted of improperly receiving gratuities for official acts and perjury before the grand jury in violation of 18 U.S.C. §1623. At the defendant's arraignment, counsel was appointed to represent him after he requested the appointment and stated that he was without funds, whereas the truth was that he had substantial amounts of cash. At trial, the government introduced evidence of the defendant's statements to

the court as to his lack of funds. These *false* statements were admitted, *inter alia*, as evidence of wilfulness in making statements before the grand jury with knowledge of their falsity. The court of appeals reversed the conviction on the ground that the defendant in exercising his Sixth Amendment right to counsel necessarily was compelled to give up his Fifth Amendment right to remain silent. (See *Simmons* v. *United States*, 390 U.S. 377 (1968) regarding competing constitutional rights.) This Court reinstated the conviction and said at p. 243:

> "... *Simmons* barred the use of pretrial testimony at trial to prove its incriminating content. Here, by contrast, the incriminating component of respondent's pretrial statements derives not from their content, but from respondent's knowledge of their falsity .... The protective shield of Simmons is not to be converted into a license for false representations on the issue of indigency free from the risk that the claimant will be held accountable for his falsehood." (Footnote omitted).

In a dissenting opinion in *Kahan*, Justice Marshall foresaw the problem existing in the instant case—may truthful compelled testimony ever be used as incriminating evidence against the speaker in a criminal prosecution? As Justice Marshall said at length at pp. 247-249:

> "As I view the matter, this tension between the Fifth and Sixth Amendments could be resolved in one of two ways. The first alternative is to permit the defendant seeking counsel as an indigent to lie about his financial situation wherever the truth might be incriminating. As a second alternative, we could require the defendant seeking appointment of counsel to tell the truth at the indigency hearing, and subject him to sanctions for his willful and knowing failure to do so, but bar use of any incriminating information so revealed.

> "I, for one, do not consider the first alternative to be acceptable. Nor did the Court of Appeals in this case, for it conceded that if the defendant willfully misrepresented his assets at the pretrial hearing, he could be prosecuted for perjury or false statement.
>
> * * *
>
> "The problem is not a frivolous one, but its solution does not lie, in my view, in permitting the defendant to perjure himself and remain free from sanction. Rather, it lies in procedures to ensure that the imposition of sanctions in appropriate cases will not in fact discourage good-faith assertions of Sixth Amendment claims. With respect to a subsequent perjury prosecution, the discouragement of legitimate Sixth Amendment claims is minimized by the requirement that the Government convince a jury that the defendant willfully and knowingly gave false testimony. I would provide a similar protection where the Government seeks to use a defendant's allegedly false pretrial statement as evidence against him at his pending criminal trial. Where such statement was purportedly given in furtherance of a Sixth Amendment right, I would bar the Government

from introducing it in evidence unless the Government proved and the trial court found that the defendant had knowingly and willfully provided false information.

"The solution, then to the tension between the Fifth and Sixth Amendments is to require the defendant seeking appointment of counsel to tell the truth at his indigency hearing, and to bar use of any incriminating information so revealed. This approach is fully consistent with our Fifth Amendment cases. '[A] witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant.' *Lefkowitz* v. *Turley,* 414 US 70, 78, 38 L.Ed. 2d 274, 94 S.Ct 316 (1973). Where the Government requires the defendant to speak in order to assert his Sixth Amendment rights, it must shelter him with the immunity provided by the Fifth Amendment for such compelled testimony."

Since the district court never made a finding that *Kahan* had wilfully misrepresented his financial situation, Justice Marshall felt the reversal of the conviction was proper.

Justice Marshall's resolution of the problem faced in *Kahan* should apply equally well in this case where the competing interests are the witness' supplanted Fifth Amendment privilege and the right of the grand jury to every person's truthful testimony. The sanction of the perjury statute will adequately punish false

testimony, and the prohibition against the incriminating use of truthful testimony will preserve the Fifth Amendment bar of compelling a person "in any criminal case to be a witness against himself".

This distinction was recognized by the Third Circuit Court of Appeals in the instant case and its precedents, *United States* v. *Frumento,* 552 F.2d 534 (3d Cir. 1977) (en banc); *United States* v. *Hockenberry,* 474 F.2d 247 (3d Cir. 1973). The facts in *Hockenberry* are similar to the facts in *New Jersey* v. *Portash, supra.* In *Hockenberry,* truthful immunized grand jury testimony was read to the petit jury and used to impeach the defendant at trial. In rejecting the prosecution's claim that an immunized statement could be used to discredit an individual as a witness in a subsequent prosecution even if the admission wes truthful, Judge Hastie said in *Hockenberry* at p. 249 as follows:

". . . a witness who testifies before a grand jury is required and sworn to tell the truth. The grant of immunity is superimposed upon that requirement. Protection is granted against future injurious use of the incriminating truth that the witness is required to speak, not against prosecution for or the use of any exculpatory falsehood that he may utter to avoid the required admission of wrongdoing. Hence, the immunity statute properly permits prosecution for perjury committed in an otherwise immunized statement and also the introduction in evidence of so much of the statement as is essential to establishing the *corpus delecti.*"

The Court of Appeals in this case defined *corpus delecti* more specifically to mean only the statement or statements of the defendant which the grand jury has charged to be perjurious, together with no more than minimal testimony *essential* to place the charged falsehood into its proper context (Pet. App. 14a, n.9). Beyond this use of immunized testimony, the government may not go. This resolution of the competing interests involved here insures not only that a perjurious witness is prosecuted, but also that the immunity grant is not disregarded[11].

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[11] The government claims that the holding of the court of appeals affords the witness broader protection than required by the Fifth Amendment. It argues in its Brief, pp. 16-19, 21, that the Fifth Amendment and immunity statute only prevent the use of information obtained to prove past crimes and that "if respondent had declined to testify before the grand jury on the ground that his testimony could be used against him if he should perjure himself, his claim of privilege would not be sustained" because perjury is a future crime. The latter argument was made by the government and rejected by an *en banc* court of appeals in *United States* v. *Frumento*, 552 F.2d 534 (3d Cir. 1977). The claim of privilege would fail not because perjury is a future crime, but because the immunity grant protects the witness against any future use of this *truthful* testimony. The immunity statute operates *after* the witness has given incriminatory testimony. *Kastigar* at 461. Future *false* testimony has never been protected. Moreover, neither the Fifth Amendment nor 18 U.S.C. §6002 on their face allow the government to use truthful immunized testimony to prove a future crime. Suppose the defendant in *Portash, supra*, was charged with a bank robbery or even perjury occuring a few years after he had given the truthful compelled

In the instant case, the government used substantively during its case in chief a number of truthful immunized statements made by respondent to prove the charges against him. This evidence would not have been in existence or available to the government to use against him but for the immunity grant. To be coextensive with the Fifth Amendment, "use and fruits" immunity must afford the witness the same protection he would have received had he invoked the privilege. The use of respondent's truthful immunized statements as incriminating evidence did not afford him the same protection as he would have received had the privilege been available and, therefore, resulted in compelling him in a criminal case to be a witness against himself. Since the prosecution did not "shoulder the entire load", respondent's Fifth Amendment rights were violated.

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testimony. The government's position would be that since the defedant is being prosecuted for future crimes, he could be cross-examined at the bank robbery or perjury trial with the prior truthful immunized testimony. In effect, at the trial of the future offenses, the government believes it would have the right to use the past compelled testimony for any purpose whatsoever. Respondent submits that such use of truthful testimony obtained under an immunity grant is equally prohibited because the immunity must afford the witness the same protection he would have received had he invoked the privilege. See, i.e., *United States* v. *Berardelli*, 565 F.2d 24, 28-29 (2d Cir. 1977) (truthful immunized testimony may not be used to prove an earlier or later perjury, but untruthful testimony may subject the witness to prosecution for perjury.)

B. The Failure of the Government to Establish the Falsity of Various Portions of Respondent's Immunized Grand Jury Testimony Prohibited It Under the Fifth Amendment From Using Such Testimony Against Him at Trial.

At trial, the government introduced in evidence the portions of the grand jury testimony alleged to be false in both counts of the indictment. The Count One testimony involved respondent's denial that he tried to locate one Harry Brown in Fort Lauderdale, Florida during the month of December, 1975. The Count Two testimony involved respondent's answers that he did not recall telling F.B.I. agents that he had loaned $10,000 to Brown.

In addition to this grand jury testimony, the government introduced during its case in chief a series of truthful excerpts of Mr. Apfelbaum's grand jury testimony. These excerpts covered a range of topics, including (1) the degree of friendship between Apfelbaum and Brown; (2) the circumstances surrounding Apfelbaum's discovery of, and visit to, Brown in Florida in 1976; (3) whether Apfelbaum and Brown discussed any loan transactions while in Florida; (4) whether Brown "patted down" Apfelbaum for weapons during his visit, or merely hugged him; (5) Apfelbaum's denial that he ever engaged in financial transactions with the Chestnut Hill dealership other than a $500 loan; (6) Apfelbaum's denial that he ever

co-signed a loan for Brown; (7) a statement that Apfelbaum was introduced to one John Orem by Harry Brown; (8) respondent's testimony that Mr. Fitzpatrick never co-signed any loans for respondent, but that such loans were signed by himself or his wife; (9) that respondent attended a birthday party for Brown; (10) that Fitzpatrick was Brown's lawyer in the past; and (11) that respondent knew Brown because respondent would bring in the District Attorney's car to Brown's dealership for servicing.

The prosecution argued in the lower courts that it "doubted" the truthfulness of portions of this testimony[12]. However, the record is devoid of any evidence to establish the falsity of any of this testimony. Respondent's suggestion to the district court that a "mini trial" would be necessary to determine the falsity of the compelled testimony not charged to be false in the indictment was rejected (A. 26). Without requiring the government to produce any supporting evidence to establish the falsehoods, the district court allowed the statements in evidence. There is no claim in this Court that the immunized testimony in question is anything but truthful.

Every court of appeals that has considered in various factual situations the government's claim that it

[12] The government also apparently conceded in the court of appeals the truthfulness of some of these excerpts, but argued that it was permissible to use them against appellant at trial anyway.

is permissible to make a variety of uses of *truthful* immunized testimony against the speaker in a criminal trial has rejected this claim. *Second Circuit: Shargel* v. *Lefkowitz*, 596 F.2d 42, 44 (2d Cir. 1979); *United States* v. *Berardelli*, *supra*, at 28-29; *United States* v. *Moss*, 562 F.2d 155, 165 (2d Cir. 1977), *cert. denied*, 435 U.S. 914 (1978); *United States* v. *Housand*, 550 F.2d 818, 823 (2d Cir.), *cert. denied*, 431 U.S. 970 (1970); *United States* v. *Kurzer*, 534 F.2d 511, 518 (2d Cir. 1976); *United States* v. *Tramunti*, 500 F.2d 1334, 1345 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974); *Third Circuit: United States* v. *Apfelbaum*, 584 F.2d 1264 (3d Cir. 1978) (instant case); *United States* v. *Frumento*, 552 F.2d 534, 542-43 (3d Cir. 1977) en banc); *United States* v. *Hockenberry*, 474 F.2d 247 (3d Cir. 1973); *Fifth Circuit: United States* v. *Partin*, 552 F.2d 621, 632 (5th Cir.), *cert. denied*, 434 U.S. 903 (1977); cf. *United States* v. *Wilcox*, 450 F.2d 1131, 1140-41 (5th Cir. 1971), *cert. denied*, 405 U.S. 917 (1972); *Seventh Circuit: United States* v. *Patrick*, 542 F.2d 381, 385-86 (7th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977); *Tenth Circuit: United States* v. *Trammel*, 583 F.2d 1166, 1168 (10th Cir. 1978), *cert. granted*, No. 78-5705 (Feb. 2, 1979); *United States* v. *Dunn*, 577 F.2d 119, 125-126 (10th Cir. 1978), rev'd. on other grounds, No. 77-949 (June 4, 1979).

The difference in approach of the courts of appeals has been over the permissible uses of *false* immunized testimony which has no Fifth Amendment protection whatever. The most restrictive use of false compelled

testimony was set forth by the court of appeals in the instant case. The court held that other than as the *corpus delecti* or core of a perjury or false swearing indictment, the government may not use immunized testimony as substantive evidence. The Second Circuit would apparently permit *false* testimony not included as the *corpus delecti* of a perjury indictment to be used to impeach a defendant, or to be introduced during the government's case in chief, or to prove a prior act, or for other evidentiary pruposes. See, i.e., *United States* v. *Tramunti*, *supra*; *United States* v. *Moss*, *supra*.[3]

Regardless of whether the Second or Third Circuit rule covering the permissible uses of false immunized

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[3] Justice Marshall observed in the dissenting opinion in *United States* v. *Kahan*, *supra*, at pp. 247-48 as follows:

> "In view of [the Court of Appeals] concession that the defendant can be penalized for willfully and knowingly falsifying information at a pretrial suppression hearing, I cannot understand the Court of Appeals conclusion that this sanction can only take the form of a separate prosecution for perjury.
>
> "If the defendant's willfully false statement can be used against him at a subsequent perjury trial, I see no reason why it cannot be used against him at his pending criminal trial."

The court of appeals in this case had difficulty with such a broad use of arguably false immunized testimony only because a lesser burden than guilt beyond a reasonable doubt is apparently permitted to show that the witness knowingly made a false statement (Pet. App. 18a-19a, n.10).

testimony is followed in the instant case, respondent is entitled to a new trial. The government never established the falsity of the compelled testimony and, for this reason, was precluded from using it against Mr. Apfelbaum in any respect at trial.

The only real authority in support of the government's position is the limited dictum in *Cameron* v. *United States*, 231 U.S. 710, 720-721 (1914), where the court said that "in prosecutions for perjury the statute [Rev. Stat. §8600, 15 Stat. 37] saves the right to use such testimony for any legitimate purpose in establishing the charge made". This *dictum* was made in a case where the government attempted to prove the perjury of testimony given before a referee with immunized testimony given before a commissioner. The court held that under the applicable immunity statute the testimony given in the proceeding before the commissioner should not have been received to establish perjury in the proceeding before the referee. The *dictum* in question contains no supporting authority and, to be consistent with the Fifth Amendment, must be construed to mean that only *false* compelled testimony could be used for any legitimate purpose to establish the charges made. The court in *Cameron* never considered the constitutional question arising from the use of truthful, as opposed to false, compelled testimony. Consequently, the government's use of truthful testimony here violated the Fifth Amendment and the immunity grant.

C. The Purpose of the Enactment of the Federal Immunity and False Declaration Statutes Was to Compel the Production of Truthful Testimony Under Carefully Limited Controls to Protect the Fifth Amendment Privilege of the Witness.

The federal immunity statute, 18 U.S.C. §6002, and the false declaration statute, 18 U.S.C. §1623, were enacted as part of the Organized Crime Control Act of 1970, P. L. No. 91-452, §201(a), 84 Stat. 927. The immunity provisions were contained in Title II of the Act, while the false declarations atatute was contained in Title IV of the Act[14].

The combination of both statutes was aimed at encouraging reluctant witnesses to cooperate during investigations by providing truthful testimony. As Representative Poff, the chief sponsor of the bill in the House, stated in regard to Title IV (116 Cong. Rec. 35292):

> "By strengthening the inducement to tell the truth and correct falsehoods, and providing for the effective prosecution and punishment of those

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[14] 28 U.S.C. §1826(a), entitled *Recalcitrant Witnesses*, was enacted as Title III of the Act. This civil contempt statute enables a court to confine an immunized witness who refuses to testify after being ordered to do so by the court.

who give false testimony, title IV substantially improves the capacity of our courts to administer justice . . ."

The false declaration statute liberalized the existing evidentiary rules which made a conviction for perjury unlikely. It abolished the two-witness rule and permits contradictory statements under oath to be the subject of a perjury prosecution without the additional proof of falsity of one of the statements. One legislative goal was to encourage truthful testimony and to protect it. As Senator McClellan, the chief sponsor of the bill in the Senate, explained (115 Cong. Rec. 5880):

". . . *The law, moreover, ought to encourage not testimony, but truthful testimony. The existing rules run counter to this goal; perjury, not truth, is protected.*

* * *

"The existing rules are, in short, an unwarranted obstacle to securing legitimate perjury convictions. There is ample protection against spiteful retaliation in the traditional safeguards applicable to every criminal case. There is no good reason why perjury—at least before grand juries and courts—should not be treated like any other crime. *Sound prosecutive discretion* and *proof beyond a reasonable doubt of a judge and jury constitute ample protection against the unwarranted charge and conviction of perjury.*" (Emphasis added).

The congressional goal to ensure the truthfulness of immunized testimony, and to punish falsehood, is consistent with the position of the court of appeals in this case and that of the other circuits. The truth-seeking process is encouraged and false testimony penalized without infringing upon the supplanted Fifth Amendment privilege.

Accordingly, 18 U.S.C. §6002 and the Fifth Amendment should be interpreted not only to permit the use of false testimony in perjury prosecutions, but also to absolutely prohibit the use of truthful immunized testimony in criminal cases against the speaker.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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